

Jur. rel
1736

Decisions

NOTE.

The table of cases and index to volumes I and II will be found in volume II. Our intention was to publish the whole of the letter A in one volume, and on finding it necessary to divide it into two volumes, it was thought best to make an index to the two volumes, so as not to divide the index to the long subject of Appeals and Writs of Error. We shall endeavor to avoid dividing a subject in subsequent volumes, the volumes in no case to exceed one thousand to one thousand one hundred pages.

See the publisher's advertisement of the series in the back of this volume.

ERRATA TO VOLUME II.

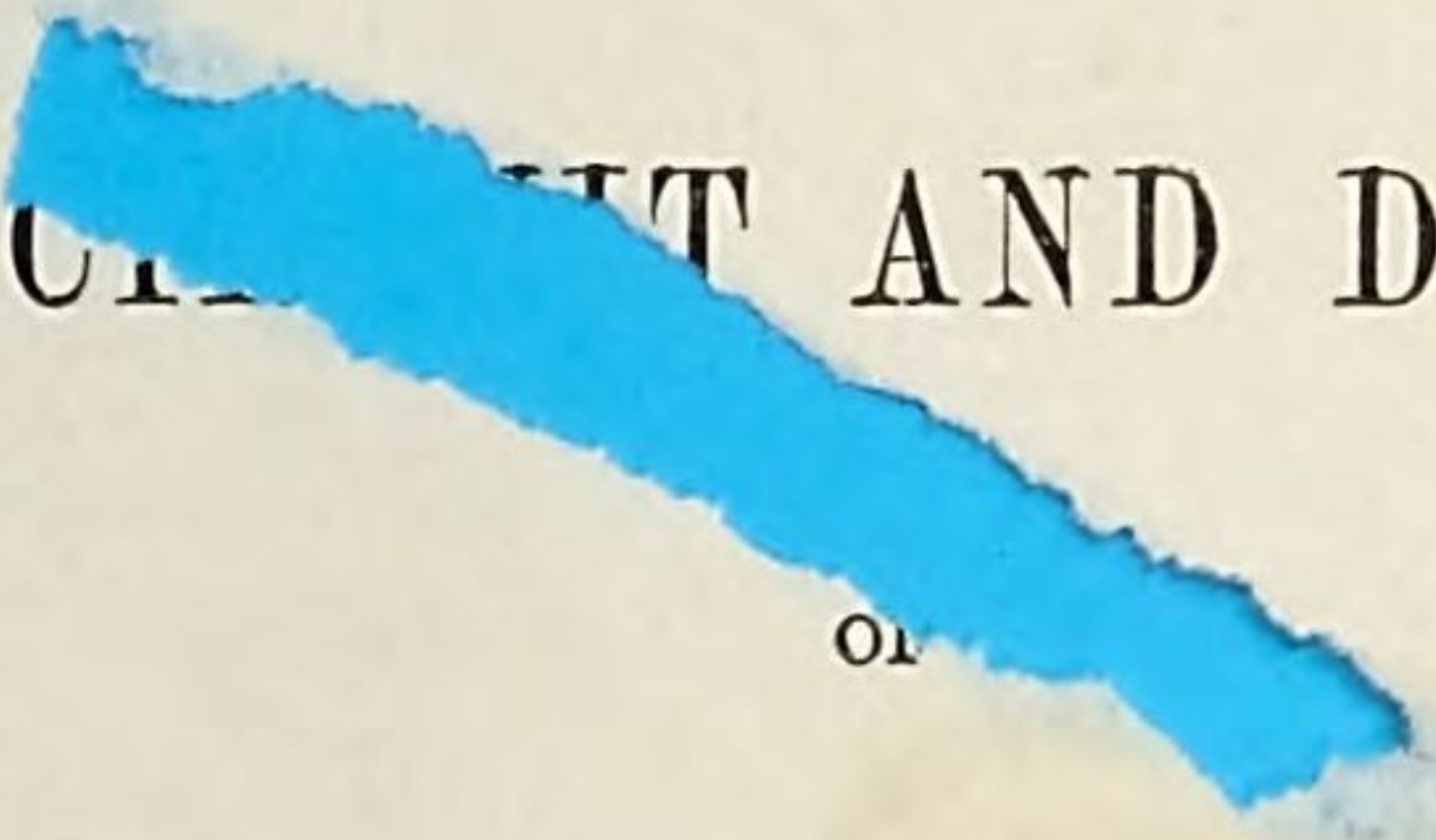
Page.	Section.	
1041		Note a—For 10 Wall., 406 read 10 Wall., 416.
1054	1643	For 1 Wall. read 2 Wall.
1085	1806	For 6 How. read 7 How.
1162	2164	For Wall. read Wheat.
1163	2175	For 9 How. read 10 How.
1165	2212	For 5 Otto read 6 Otto.
1166	2214	For 5 Otto read 6 Otto.
1170	2274	For 13 How. read 14 How.
1181	2376	For Ficks read Nicks.
1229		Title of case—Com'rs v. Clark read Muller v. Dows.
1232	2632	For 9 Pet., 85 read 8 Pet., 118.
1236	2675	For 2 Pet. read 4 Pet.
1236	2684	For 646 read 546.
1253	2731	For Pet. read How.
1267	2771	For 599 read 499.
1296	42	For How. read Wall.

N. B.—Make the corresponding changes in the two tables of cases.

FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME,  AND DISTRICT COURTS

OF

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. II.

APPEALS—AWARD.

ST. LOUIS, MO.:
THE GILBERT BOOK COMPANY.
1884.



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THE HISTORY OF THE
CITY OF BOSTON

FROM 1630 TO 1800

By JOHN H. COLEMAN, Esq.
of the City of Boston.
In two Volumes.
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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal.....	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee.....	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall.....	Marsh.
Bissell	Biss.	Martin.....	Martin (N. C.).
Black.....	Black.	Mason	Mason.
Blatchford.....	Blatch.	Montana Territory	Mont. T'y.
Blatchford's Prize Cases...	Bl. Pr. Cas.	Newberry.....	Newb.
Blatchford & Howland....	Bl. & How.	National Bankruptcy Regis-	
Bond	Bond.	ter	N. B. R.
Brewster	Brewster.	Olcott	Olc.
Brockenbrough	Marsh.	Opinions of Attorneys-Gen-	
Brown.....	Brown.	eral.....	Opp. Att'y Genl.
Call	Call (Va.).	Oregon	Oreg.
Central Law Journal.....	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
Chicago Legal News	Ch. Leg. N.	Paine.....	Paine.
Clifford	Cliff.	Peters	Pet.
Colorado Territory.....	Colo. T'y.	Peters' Admiralty.....	Pet. Adm.
Connecticut Reports.....	Conn.	Peters' Circuit Court	Pet. C. C.
Cooke	Cooke (Tenn.).	Philadelphia Reports	Phil.
Court of Claims.....	Ct. Cl.	Pittsburgh Reports	Pittsb. R.
Crabbe	Crabbe.	Sawyer	Saw.
Cranch	Cr.	Smith	Smith (N. H.).
Cranch's Circuit Court....	Cr. C. C.	Sprague	Spr.
Curtis	Curt.	Story	Story.
Dakota Territory.....	Dak. T'y.	Sumner.....	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis.....	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court	Wall. C. C.
Federal Reporter.....	Fed. R.	Wallace, Jr.....	Wall. Jr.
Fisher's Patent Cases.....	Fish. Pat. Cas.	Ware	Ware.
Flippin ...	Flip.	Washington.....	Wash.
Gallison	Gall.	Washington Territory.....	Wash. T'y.
Gilpin	Gilp.	Wheaton	Wheat.
Hempstead	Hemp.	Wheeler's Criminal Cases ..	Wheeler,
Hoffman.....	Hoff.	Woods.....	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

VII. APPELLATE JURISDICTION OF CIRCUIT COURT.

§ 1262. *Habeas corpus*.—Circuit courts have no power to re-examine a decision of the district court in a proceeding under the *habeas corpus* act. *Seavey v. Seymour*, 3 Cliff., 441. See *supra*, IV. 3.

§ 1263. *Patents*.—The circuit court has appellate jurisdiction, by writ of error, over the district court in proceedings therein to annul a patent under the tenth section of the patent act. *Stearns v. Barrett*, 1 Mason, 162.

§ 1264. *Decisions of state courts*.—The circuit courts of the United States have no power to review or revise the decision of a state court, but must give it full faith and credit. *Amory v. Amory*, 3 Biss., 270.

§ 1265. *Forfeiture*.—The power of the circuit court to review a judgment or decree of distribution among various claimants of the informer's share in a forfeiture, after condemnation and sale of the forfeited property, and that the claimants are, in such sense, parties to the proceeding, that they may invoke the exercise of that jurisdiction, is established by the authorities. *Wheaton v. United States*,* 8 Blatch., 474.

§ 1266. *From consular court*.—An appeal lies from the consular court of Shanghai, China, to the circuit court of the district for California, where the amount in controversy, exclusive of costs, exceeds \$2,500. *The Ping-On v. Blethen*, 11 Fed. R., 610.

§ 1267. *Amount involved*.—The circuit court has jurisdiction on a writ of error to the district court, where the action was on an official bond for \$1,000 penalty, the declaration containing no breach, showing a smaller sum than \$50 to be due. *Postmaster-General v. Cross*, 4 Wash., 327.

§ 1268. In an action for an assault and battery on the high seas, the damages must be stated in the libel at a sum exceeding \$50, to authorize an appeal to the circuit court. *Jenks v. Lewis*,* 3 Mason, 503.

§ 1269. On a libel *in rem* for subtraction of wages, the owner appeared and contested the suit, and a decree was entered for a sum exceeding \$50. The vessel was sold under order of court, and the proceeds amounted to less than \$50, after paying costs and charges. *Held*, that as the decree *in rem* in such a case would bind the claimant in a suit *in personam* founded on the decree, the wages were the matter in dispute, and the claimant was entitled to an appeal. *The Enterprise*,* 2 Curt., 317.

§ 1270. Where a creditor resists the discharge of a bankrupt, *quære*, whether there is an "amount in controversy" sufficient to sustain an appeal. *Ruddick v. Billings*,* Woolw., 330.

§ 1271. An appeal is given from the decree of the district court, when it is final, and the matter in dispute exceeds the value of \$50. The appellant must have both points in his favor. In this case a petition was filed by a part owner of a vessel, asking a sale of the vessel, or that the court would take her from the possession of the other party, and permit the petitioner to send her to sea. The petition was dismissed, and a further order was made, preventing the respondent from taking the vessel to sea without giving bail. The petitioners were allowed an appeal. *Davis v. The Seneca*,* Gilp., 34.

§ 1272. No appeal lies from the district court, except in cases where the matter in dispute, exclusive of costs, exceeds the sum of \$50. *Shirley v. Titus*,* 1 Sumn., 447.

§ 1273. Where a libel in the district court claimed \$300 damages, and a decree was rendered for \$40, in which the libelant acquiesced, it was held that the respondent could not appeal to the circuit court, as the amount in controversy was reduced by the libelant's acquiescence to less than \$50. *Greigg v. Reade*, Crabbe, 65.

§ 1274. *Amendments*.—A seaman sued the master to recover \$30.95, a balance alleged to be due as wages, and also to recover damages for an assault. The amount of damages claimed for the assault was not specified. The libel was dismissed, on the ground that the two claims could not be united in the same libel, and the libelant appealed. A motion was made to dismiss the appeal, because it did not appear that the amount in controversy was sufficient to give jurisdiction. The libelant moved to amend his libel, by laying the damages for the assault at \$300; and attention was also called to the deposition of a witness, in which the witness said that he would not have run the risk of the blow given to the libelant for \$100. TANEY, C. J., rendered the following opinion:

"The amendment cannot be made. If the court had jurisdiction of the case, that is, if enough appeared in the record to show that the circuit court had a right to review the decision of the district court in this case, there is no doubt the court would have the power to allow any amendment necessary to bring the justice of the case fairly and fully to trial. But this court has no authority, by law, to review the decree of the district court, unless the matter in controversy amounts to \$50; the record does not show that it amounts to this sum; and

the object of the amendment is to change the record, in order to give the court jurisdiction in a case where, according to the record before them, they have not jurisdiction; the court think this cannot be done. If the case showed that the appeal was legally in this court, then having jurisdiction over it, the court could permit the pleadings to be so amended as to enable the court to do justice between the parties; but we cannot acquire jurisdiction by altering the record which has come to us from the district court.

"The deposition of the witness does not show the amount of damages claimed by the libelant, and it is the claim of the libelant, and the answer of the respondent denying the claim, that make the controversy, and ascertain the amount in dispute. Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony has been received in the supreme court, upon appeal, to show its value, and to show the jurisdiction of the court; and so, too, as to the value of an office, where the right to the office is the matter in controversy. But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court; and the amount in dispute is shown by the claim made by one, and the denial made by the other. The damages might in fact have amounted to \$100, and yet, if the libelant claimed but \$10 as his damages, \$10 would be all that was in controversy." *Agnew v. Dorman*, Taney, 386.

VIII. TIME WITHIN WHICH APPEALS AND WRITS OF ERROR MUST BE BROUGHT.

SUMMARY—*No time fixed*, §§ 1275-1277.—*Dismissal; second appeal within the five years*, § 1276.—*Appeal not perfected in time*, §§ 1278, 1285.—*Decree not suspended by motion for rehearing*, § 1279.—*Writ of error not brought until filed*, § 1280.—*Error to state court*, § 1281.—*Computed from date of final decree*, § 1282.—*Parties intervening and perfecting an appeal*, § 1283.—*Transcript to be filed at term succeeding allowance of appeal*, § 1284.—*Entry nunc pro tunc*, §§ 1286, 1287.—*Appeals in admiralty*, §§ 1288, 1290, 1291.—*Decree entered after adjournment*, § 1289.—*Decree cannot be opened at subsequent term*, § 1292.—*Appeal from district court*, § 1293.—*Error coram nobis*, § 1294.

§ 1275. Where the right of appeal is given, but no time is fixed, the time within which the appeal must be taken is governed by the law applicable to other cases. *United States v. De Pacheco*, §§ 1295-1297.

§ 1276. If the appellant fails to file the transcript within the time required by the rules, the appellee may docket and dismiss; but in such case the appellant may take another appeal within the five years. *Ibid.* See §§ 1345, 1352.

§ 1277. Where an act of congress authorizes an appeal, without further directions, the provisions of the acts of 1789 and 1803, as to the time of taking and returning the appeal, and the service and return of a citation, must be complied with. *Castro v. United States*, §§ 1298-1301.

§ 1278. A decree was entered in 1859, and an appeal was taken in 1864, in court, in the presence of the opposing counsel, but no citation was issued, and the appeal was not returned to the next term of the court. In May, 1865, a citation was issued and served, and was returned with the record to the term next ensuing. *Held*, that the supreme court had no jurisdiction. *Ibid.*

§ 1279. An appeal taken more than five years from the rendition of the decree is too late; the decree is not suspended by a motion for a rehearing filed after the term, or more than forty-two days after entering judgment, the time allowed by § 987 of the Revised Statutes within which to file a motion for a new trial. *Cambuston v. United States*, §§ 1302, 1303.

§ 1280. A writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment; and if not so filed within five years after the judgment is rendered, it will be barred. *Brooks v. Norris*, §§ 1304, 1305.

§ 1281. A writ of error to a state court is barred if not brought within two years after the judgment complained of is rendered. *Cummings v. Jones*, § 1306.

§ 1282. Where the court makes an order settling the terms of a final decree, and on a subsequent day enters and signs a formal decree, as of the date of the order, the time within which an appeal must be taken must be computed from the date of the final decree, and not from the entry of the order. *Rubber Co. v. Goodyear*, §§ 1307, 1308. See § 1337.

§ 1283. Where an appeal is allowed but not perfected, and subsequently other persons are permitted to become parties and perfect the appeal, in determining whether the transcript was filed in time, the time must be computed from the original allowance of the appeal. The prayer for an appeal and the order allowing it constitute a valid appeal; a bond is not essen-

tial, but may be given with effect at any time while the appeal is alive. The recital in a citation that an appeal was allowed at a certain time does not prove that it was then allowed. *Edmonson v. Bloomshire*, §§ 1309-1312. See § 1351.

§ 1284. Cases reviewed and approved to the effect that the court has no jurisdiction unless the transcript is filed during the term next succeeding the allowance of an appeal. *Ibid.*

§ 1285. Decree rendered on June 13, 1861; appeal prayed at June term, 1865, and allowed *nunc pro tunc*, as of June 13, 1861. *Held*, that there was nothing in the record warranting the order; and as there was no citation, and the record was not filed at the next term, the appeal was dismissed. *Garrison v. Cass County*, § 1313.

§ 1286. Where an appeal is asked for in time, but not entered, the entry may be made *nunc pro tunc*; and where the delay is caused by the fault of the clerk in not entering the prayer for the appeal, the appeal will not be dismissed because the transcript was not filed in due time. *United States v. Vigil*, §§ 1314-1317. See §§ 1338, 1351.

§ 1287. A decree was entered on August 2, 1879, and on August 1, 1881, the circuit judge approved a bond and signed a citation. The bond was filed on the same day, and the citation was served on the 18th of August. On October 8th, the circuit judge entered an order allowing the appeal *nunc pro tunc* as of August 1st. *Held*, that the appeal was in time; that an appeal was allowed by taking the security and signing the citation, and that the order of October 8th was not necessary. *Brandies v. Cochrane*, § 1318.

§ 1288. Appeals in admiralty are to be taken at the term at which the decree is rendered; but it seems that the district court may regulate the practice by rule. *The New England*, §§ 1319-1323. See § 1340.

§ 1289. Where the decree was not entered up until the morning after the adjournment, it seems that it was then within the power of the judge either to grant a rehearing or to allow an appeal. *Ibid.*

§ 1290. Appeals in admiralty are to be taken to the term of the circuit court next after the term of the district court at which the decree is rendered. Section 635 of the Revised Statutes does not extend the time to one year. *The Oriental*, §§ 1324-1330. See § 1347.

§ 1291. The right to appeal from a decree of the district court is lost, if the appeal be not taken to the term of the circuit court held next after the making of the decree. *United States v. The Glamorgan*, §§ 1331-1333.

§ 1292. A final decree of the district court cannot be opened at a subsequent term so as thereby to confer a new right of appeal, or revive a right lost by lapse of time. (Power of courts over their final decrees considered.) *Ibid.*

§ 1293. In the absence of a provision by congress, an appeal from the district court must be taken in open court, before the adjournment of the court *sine die*, unless further time is allowed. A uniform course of practice is equivalent to a rule of court, and must be considered as directory to the parties. *Norton v. Rich*, § 1334.

§ 1294. The limitation of five years within which a writ of error must be brought under section 22 of the judiciary act does not apply to writs of error *coram nobis*. *Strode v. The Stafford Justices*, §§ 1335, 1336. See § 1346.

[NOTES.— See §§ 1337-1350.]

UNITED STATES *v.* DE PACHECO.

(20 Howard, 261-264. 1857.)

APPEAL from U. S. District Court, Northern District of California.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—A motion has been made to docket and dismiss this case. It appears by a certified copy of the record in the district court of the United States for the northern district of California, that a decree was passed by that court on the 22d of September, 1856, confirming the title of Pacheco to certain lands therein mentioned. No appeal was taken by the United States at the term at which the decree was made, but an appeal was entered at the next succeeding term, in March, 1857. Pacheco by his counsel now moves to docket and dismiss the case upon two grounds: 1st. Because the appeal was not taken at the term at which the decree was rendered; and 2d. If the appeal might legally be taken at the succeeding term, yet no transcript of the record was filed here within the first six days of the present term of this court.

§ 1295. *Where the time for an appeal is not fixed, it is governed by the general law.*

The first question raised by the motion depends upon the construction of the act of congress of March 3, 1851, which authorizes an appeal to this court in cases of this description. The act gives the right in general terms to the party against whom the judgment is rendered, and does not limit the time within which the appeal shall be made, nor refer to any particular act of congress by which the time shall be regulated. It must therefore be governed by the judiciary acts of 1789 and 1803, which regulate writs of error and appeals to this court from inferior tribunals. And by these acts the party may take his appeal at any time within five years after the passing of the decree by the inferior court. The appeal in question was therefore made in time; and this motion cannot be maintained on that ground.

§ 1296. *Where appellant fails to file transcript in time, appellee may docket and dismiss. (a)*

The second reason assigned in support of the motion depends upon the sixty-third rule of this court. Under this rule, the appellee in a case from California is entitled to have the case docketed and dismissed, if the transcript of the record is not filed in this court within the first six days of the term next ensuing such appeal, provided the decree of the court below was rendered sixty days before the commencement of the said term of this court. As we have already said, the decree was rendered in September, 1856, and the appeal taken in March, 1857. Consequently it was the duty of the appellant in this case to file a transcript of the record within the first six days of the present term. This was not done. And it appears that no transcript of the record has yet been filed by the appellant. The appellee is therefore entitled to have the case docketed and dismissed under the rules above mentioned. It is true he has not filed the certificate mentioned in the rule, but has filed a full transcript of the record. But the transcript shows all of the facts which the clerk by the rule is required to certify; and it has always been held by the court to be equivalent to the certificate which the rule prescribes.

§ 1297. *Where an appeal is dismissed because not filed in time, the party may take another appeal within the five years. (b)*

It is proper, however, to add, in order to prevent mistake on this subject, that the only effect of docketing and dismissing a case under this rule is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court, which the appeal created, and does nothing more. And after the case has been docketed and dismissed, the party against whom the decree was rendered may still, at any time within five years from the date of the decree, take a new appeal in the inferior court, and if he files the transcript of the record in this court within the first six days of the term next ensuing his appeal, the appeal will be valid, and the case as fully before this court, for examination and revision, as if it had been brought here at the first term. The act of congress authorizes the appeal at any time within five years, and the period allowed by law cannot be shortened by any rule or practice of a court. Nor was it intended to be diminished by the rules in ques-

(a) Appeals and writs of error must be filed and docketed within the first six days of the term, or the appellee may docket and dismiss; but if less than thirty days intervene between the entry of judgment or decree and the sitting of the court, then the filing and entry must be made within thirty days from the commencement of the term. The time will not be extended because the clerk had other duties which prevented his furnishing the transcript in time. *Sturgess v. Harrold*,* 18 How., 40; *United States v. Fremont*,* 18 How., 30; *United States v. Boisdore*,* 7 How., 658.

(b) Same ruling in *Steamer Virginia v. West*, 19 How., 182.

tion. And when an appeal is taken in the court below, if the appellee desires a speedy and final decision of the controversy, it is in his power to bring the case up to the next succeeding term of this court. Indeed, it sometimes happens, under this rule, that the court permits the transcript of the record to be filed by the appellant, and the case docketed for argument, at the same term at which it had previously been docketed and dismissed on the motion of the appellee. And where the appellant satisfies the court that the omission to file the transcript within the first six days was not owing to any fault or negligence on his part, the court has always allowed him to file it at the same term, and docket the appeal for trial, without putting him to the expense and delay of another appeal. It follows, from what we have said, that although the case before us must be docketed and dismissed, yet this will not prevent the United States from filing a transcript at the present term, and docketing the case for argument, if they can show that the delay has not arisen from any fault or negligence on their part. And if they fail to do so, they may yet take another appeal at any time within five years, and bring here the decree of the district court for examination and revision. And if the appellee, after the case is docketed and dismissed, proceeds upon the decree of the district court, and obtains a patent for the land, his title will still be subject to the decision of this court, if the government shall hereafter bring up the case within the time limited by law. We have deemed it proper on this occasion to enter into this full explanation of the rule of court referred to, on account of the multitude of appeals which must unavoidably come up from the district courts of California, and which, in some shape or other, may be brought before this court upon motions to dismiss.

CASTRO v. UNITED STATES.

(3 Wallace, 46-51. 1865.)

APPEAL from U. S. District Court, Northern District of California.

STATEMENT OF FACTS.—Under the act of March 3, 1851, for the settlement of private land claims in California, a decree was entered November 23, 1859, and an appeal therefrom to the supreme court was dismissed. Another appeal was taken November 11, 1864, in the presence of the district attorney in court, but the appeal was not returned and docketed at the next term of the court, and no citation was issued until May, 1865. Service of the citation then issued was acknowledged, the record was filed at the next term of the court, and counsel made an arrangement, subject to the approval of the attorney-general, to submit the cause on printed briefs. Motion to dismiss.

§ 1298. *An appeal must be authorized by some act of congress, and must be brought in substantial conformity with legislative directions.*

Opinion by CHASE, C. J.

We have no jurisdiction of this appeal, unless it has been allowed by some act of congress, and has been brought in substantial conformity with the legislative directions. The appellate jurisdiction of this court is, indeed, derived from the constitution; but by the express terms of the constitutional grant, it is subjected to such exceptions and to such regulations as congress may make. In the judiciary act of 1789, and in many acts since, congress has provided for its exercise in such cases and classes of cases, and under such regulations, as seemed to the legislative wisdom convenient and appropriate. The court has always regarded appeals in other cases as excepted from the grant of appellate power, and has always felt itself bound to give effect to the regulations by which

congress has prescribed the manner of its exercise. We here use the word appeals in its largest sense, comprehending writs of error, and every other form in which appellate jurisdiction may be invoked or brought into action.

§ 1299. *The record and citation must be returned to the next term of the court.*

The acts of congress providing for and regulating appeals have been often under the consideration of this court; and it may now be regarded as settled, that in the cases where appeals are allowed by the judiciary act of 1789, and the additional act of 1803, the writ of error, or the allowance of appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the writ is sued out or the appeal allowed; otherwise the writ of error, or the appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ or a new appeal. *United States v. Hodge*, 3 How., 534; *United States v. Villabolas*, 6 id., 90; *United States v. Curry*, id., 112; *Steamer Virginia v. West*, 19 id., 182; *Insurance Co. v. Mordecai*, 21 id., 200; *Mesa v. United States*, 2 Black, 721.

§ 1300. *Where the record is not returned to the next term, a citation subsequently issued is of no avail; and the presence of counsel in court when the appeal is taken is not material.*

In the case now before us, the rule just noticed was not followed. The appeal was allowed on the 11th November, 1864, and the allowance, with a citation to the adverse party, duly served, and a copy of the record should have been sent here at the next term. This was not done, and the appeal, therefore, became void. The citation subsequently issued was consequently without avail, for there was no subsisting appeal. The fact that the district attorney was present in court cannot change this conclusion. We are not prepared to admit that the mere presence of counsel in court at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, would dispense with the necessity for a citation. Certainly it would have no greater effect; and in the case before us, a citation, even if issued and served contemporaneously with the allowance of the appeal, would have availed nothing, because of the omission to make the required return to the next term.

§ 1301. *Where an act of congress merely authorizes an appeal, the provisions of the acts of 1789 and 1803, as to time, and the issuing and service of citation, must be observed.*

If this appeal, therefore, is to be disposed of under the acts of 1789 and 1803, as interpreted by this tribunal, it must be dismissed. But it does not come before us under those acts. It was allowed under the tenth section of the act of March 3, 1851, to ascertain and settle private land claims in the state of California, which authorizes the allowance of appeals on application to the district court, and giving security, if required, for prosecution. This act makes no provision concerning returns to this court, and none concerning citations; nor does it impose any limitation of time within which appeals may be allowed. But we cannot suppose that congress intended no regulation of these appeals in these important respects. It had already prescribed regulations for the most usual invocation of appellate jurisdiction; and when it provided for appeals in these land cases from the district court for California, it had, doubtless, these regulations in view. We think, therefore, that the appeals authorized by this section must be regarded as appeals subject to the general

regulations of the acts of 1789 and 1803. If we held otherwise, we should be obliged to sanction appeals taken at any term, and brought here at any time after final decision; or to confine the right of appeal to the term of the district court in which the decision complained of was made. We cannot ascribe to congress either intention.

The appeal before us, therefore, must be considered as having been made subject to those regulations, and must be dismissed for want of conformity to them by the appellant.

Motion granted.

CAMBUSTON v. UNITED STATES.

(5 Otto, 285-288. 1877.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is an appeal from the district court of the United States for the district of California, in a proceeding under the “Act to ascertain and settle the private land claims in the state of California,” passed March 3, 1851. 9 Stat., 631. The case was here at the December term, 1857, when a former decree of the district court was reversed and the cause sent back for further hearing. *United States v. Cambuston*, 20 How., 59. The mandate was filed in the court below, May 5, 1859, and the further hearing resulted in a decree, November 12, 1859, rejecting the claim. The court adjourned for the term on the first Monday in December, 1859, previous to which time no motion for a new trial or petition for rehearing had been filed. On the 24th of February, 1860, Lansing B. Mizner, as “a party in interest,” filed with the clerk of the court a petition for rehearing. What his interest actually was nowhere appears in the record. A copy of this petition was served on the district attorney of the United States the same day the original was filed in the clerk’s office; and March 13, 1860, the district attorney and the attorney for the claimant entered into the following stipulation: “It is hereby stipulated that Tully R. Wise, acting United States district attorney, waived written notice to him of a motion to be made for a new trial during the term of the United States district court, ending the first Monday in December last, and that he considered a verbal notice of intention to move as sufficient to him, and then given to him, the said Wise. It is further stipulated that if the said Henry Cambuston now has the right to have the said motion heard, it shall not be prejudiced by delay until the return of the Hon. Ogden Hoffman.”

Nothing further was done until April 2, 1875, when the widow of Cambuston—he having died January 22, 1869—appeared in court and asked to “be permitted to become the party claimant of the land,” as executrix of the will of her deceased husband, which had been admitted to probate May 3, 1869. An order to this effect was made April 3, 1875, and on the same day the claimant asked that a new trial be granted, and that the decree rejecting the claim might be reversed. The parties thereupon appeared, and, after hearing, the court denied the motion. On the same day, April 3, 1875, this appeal was allowed, both from the final decree and the order refusing a new trial. The United States now move to dismiss the appeal because taken too late.

§ 1302. *An appeal from a decree taken more than five years after its rendition is too late; and the decree will not be suspended by a motion for a rehearing filed after the term.*

The statute in force when the decree was rendered provided that writs of error and appeals should not be brought to this court except within five years

after passing or rendering the decree or judgment complained of. 1 Stat., 85, sec. 22. As this decree was rendered November 12, 1859, and the appeal not taken until April 3, 1875, it is clear that the motion to dismiss should be granted, unless the petition for rehearing or motion for a new trial suspended the operation of this statute. In *Brockett v. Brockett*, 2 How., 238, it was held that a petition for rehearing filed during the term, and actually entertained by the court, suspended the operation of a decree in equity until the petition was disposed of. Neither the petition for a rehearing nor the motion for a new trial in this case was filed, or the attention of the court in any manner called to such a proceeding, during the term at which the decree was rendered. The proceeding before the district court was statutory and not at common law or in equity. It was, however, a suit, and must be governed by the rules of law applicable to that class of judicial proceedings. Consequently, when the term closed at which the decree was rendered, the parties were out of court and the jurisdiction ended so far as that court was concerned, no steps having been taken to keep it alive. The decree was then in full force and operative for all purposes. According to the practice in suits at common law and in equity, no step has since been taken which can have the effect of suspending the decree for the purpose of an appeal. By section 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law; and by section 987, when a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of the court a petition for a new trial. If such petition is filed within such term of forty-two days, with a certificate thereon of any judge of the court that he allows it to be filed, execution shall, of course, be further stayed until the next session of the court. From this legislation it is apparent that it was not the policy of congress to suspend the operation of a judgment so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition. Here judgment was rendered November 12, 1859, and the petition for rehearing was not filed until one hundred and twenty-five days thereafter. The stipulation between counsel, under date of March 13, 1860, was not that a motion for new trial had been filed, but that notice of an intention to make such a motion had been given, and that if a hearing could then be had, it should not be prejudiced by further delay until the return of the district judge. This application seems never to have been brought to the attention of the court. It is unnecessary to decide whether such a motion can be filed after the term has closed, if no application is made during the term for stay of execution under the statute or for an extension of time to prepare the motion. In suits in equity the practice is even more strict. Equity rule 88 provides that in cases where an appeal lies to this court, no rehearing shall be granted after the term at which the final decree shall have been entered and recorded.

§ 1303. *No appeal lies from an order refusing a new trial.*

We are clearly of the opinion, therefore, that the appeal from the decree of November 12, 1859, was not taken in time, and as no appeal lies from the order refusing the new trial,—*Warner v. Norton et al.*, 20 How., 448,—it follows that the motion to dismiss must be granted; and it is so ordered.

BROOKS v. NORRIS.

(11 Howard, 204-208. 1850.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case is brought here by writ of error upon a judgment rendered in the supreme court of the state of Louisiana, and a motion has been made to dismiss the writ. It appears by the record that the judgment was rendered on the 25th of October, 1843. The writ of error by which the case is brought here was allowed by the chief justice of the state court, upon the petition of the appellant, on the 19th of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court in which the judgment was rendered, and on the same day, as appears by indorsement upon it, filed in that office by the counsel for the plaintiff in error. More than five years from the day of the judgment had therefore elapsed when this writ of error was filed.

§ 1304. *A writ of error is not "brought" until it is filed in the court that rendered the judgment.*

The act of 1789, c. 20, § 22 (1 Stats. at Large, 84), provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.

§ 1305. *A writ of error not filed in the proper court within the time limited is barred.*

In this case, therefore, five years had elapsed before the writ of error was brought, and the limitation of time in the act of congress was a bar to the writ. According to the English practice, the defendant in error must avail himself of this defense by plea. He cannot take advantage of it by motion, nor can the court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the court. It is a defense which the defendant in error may or may not rely upon, as he himself thinks proper. But according to the established practice of this court he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court. And either party, without any formal assignment of error or plea, may avail himself of any objection which appears upon the record itself. In this case the bar arising from the lapse of time is apparent on the record, and the defendant may take advantage of it by motion to quash or to dismiss the writ. As this objection is conclusive, it is unnecessary to inquire whether the writ of error was allowed or issued by proper authority, or what previous defects may be cured by the appearance of the defendant in error. The writ must be dismissed upon the ground that it is barred by the limitation of time prescribed by the act of congress.

CUMMINGS v. JONES.

(14 Otto, 419. 1881.)

ERROR to the Supreme Court of Louisiana.

§ 1306. *A writ of error to a state court must be brought within two years.*

Opinion by WAITE, C. J.

This is a writ of error to the supreme court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is whether the limitation of two years prescribed by sec. 1008 of the Revised Statutes, for bringing writs of error to the circuit and district courts, applies to writs of error to state courts. We have no hesitation in saying it does. Sec. 1003 provides that "writs of error from the supreme court to a state court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States." This is almost the exact language of a similar provision in the twenty-fifth section of the judiciary act of 1789, and we are not aware it was ever supposed that writs issued to the state court under that section were not subject to the limitation prescribed for writs to the circuit courts by the twenty-second section. In *Brooks v. Norris*, 11 How., 204, this seems to have been assumed, and a writ to a state court was dismissed "on the ground that it is barred by the limitation of time prescribed by the act of congress." There was at that time no other limitation than the one contained in the twenty-second section.

Inasmuch as the writ was not brought within two years after the judgment complained of was rendered, the motion is granted.

RUBBER COMPANY v. GOODYEAR.

(6 Wallace, 153-157. 1867.)

APPEAL from U. S. Circuit Court, District of Rhode Island.

STATEMENT OF FACTS.—On November 28, 1866, an order was made in this case, overruling certain exceptions to the master's report, and confirming the same, and also containing a finding in favor of respondents, and that they do recover, etc., at the same time reciting the entering of an appeal and fixing the amount of the bond at double the amount of the decree. On December 5, 1866, a final decree, pursuing the terms of the order, was entered, as of November 28, 1866.

Opinion by CHASE, C. J.

The final decree, filed and entered on the 5th of December, 1866, it will be seen, is for the most part in the very language of the order; but uses the introductory words appropriate to a decree, and describes particularly the patents in controversy, and ascertains the amount of costs taxed. It omits the explanatory directions of the order as to the bond to be given on appeal; but the entry of the decree is followed immediately by another entry stating that an appeal was prayed for by respondents in open court, and was allowed, upon filing a bond within ten days with sureties to the satisfaction of the district judge.

§ 1307. *The time within which an appeal must be taken must be computed from the entry of the final decree.*

Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered there-

after; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause. We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the circuit court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree. It appears to have been entered "as of the 28th of November." But this circumstance did not affect the rights of parties in respect to appeal. Those rights are determined by the date of the actual entry, or of the signing and filing of the final decree. That test ascertains, for the purpose of appeal, the time of rendering the decree, as the 5th of December, 1866. The appeal in this case, therefore, was rightly taken to the present term. The motion to dismiss must therefore be denied.

§ 1308. *The security in an appeal bond need not be in any fixed proportion to the decree. Supreme court may increase or diminish.*

We have also considered the motion of appellants for the reduction of the amount of the bond for *supersedeas*. In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal. In order to make the appeal operate as a *supersedeas*, it is necessary for the appellant to give good and sufficient security for the prosecution of the appeal, and for all costs and damages that may be adjudged against him. This security is usually given by bond, with one or more sureties, and the twenty-second section of the judiciary act requires that it be taken by the judge who signs the citation on appeal. It is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be given within ten days from the rendering of the decree. The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here. It is, therefore, matter of discretion with this court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require. In this case the decree was for \$310,757.72 damages, and \$7,429.91 costs; and, following the usual practice, the judge required a bond in double the amount of the decree. We are satisfied that a bond in a much less amount will be entirely sufficient, and inasmuch as it appears that security in part, for the amount they might be decreed to pay, had been given by the present appellants before the bond on appeal was required, by a deposit of bonds of the United States, and other private bonds, amounting in all to a sum not less than \$200,000, we will order that the appellants have leave to withdraw the appeal bond now on file upon filing a bond in lieu thereof in the sum of \$225,000, with good and sufficient sureties, to the satisfaction of the clerk of this court.

EDMONSON v. BLOOMSHIRE.

(7 Wallace, 306-313. 1868.)

APPEAL from U. S. Circuit Court, Southern District of Ohio.

STATEMENT OF FACTS.— Bill filed in 1854, and dismissed July 16, 1859; appeal allowed May 26, 1860, but no bond filed; application by petitioners November 14, 1865, reciting the death of the plaintiffs, and asking permission to become parties and to perfect the appeal; petition granted on November 5, 1865, bond

filed November 22, citation issued December 8, and transcript filed January 3, 1866.

Opinion by MR. JUSTICE MILLER.

In the cases of *Villabolos v. United States* and *United States v. Curry*, decided at the December term, 1847, and especially in the latter case, it was held, on full consideration, that whether a case was attempted to be brought to this court by writ of error or appeal, the record must be filed before the end of the term next succeeding the issue of the writ or the allowance of the appeal, or the court had no jurisdiction of the case. This was repeated in the *Steamer Virginia v. West*, 19 How., 182; *Mesa v. United States*, 2 Black, 721, and *United States v. Gomez*, 1 Wall., 690.

In *Castro v. United States*, 3 Wall., 46, the same question was raised. The importance of the case, together with other considerations, induced the court to consider the matter again at some length. Accordingly, the present chief justice delivered an opinion, in the course of which the former cases are considered and the ground of the rule distinctly stated.

§ 1309. *This court has no jurisdiction of a case unless the transcript be filed during the term next succeeding the allowance of an appeal.*

Other cases followed that, and in *Mussina v. Cavazos*, decided at the last term, the whole doctrine is again reviewed, and the rule placed distinctly on the ground that this court has no jurisdiction of the case unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court; that the writ of error, like all other common law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable; that the act of 1803, which first allowed appeals to this court, declared that they should be subject to the same rules, regulations and restrictions as are prescribed in law in writs of error. These principles have received the unanimous approval of this court, and have been acted upon in a large number of cases not reported, besides several reported cases not here mentioned. And the court has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court, we cannot do otherwise. In the case of *United States v. Curry*, Chief Justice Taney, answering the objection that the rule was extremely technical, replied that nothing could be treated by this court as merely technical, and for that reason be disregarded, which was prescribed by congress as the mode of exercising the court's appellate jurisdiction. We make the same observation now, and add, that it is better, if the rule is deemed unwise or inconvenient, to resort to the legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century. We are of opinion that the present case falls within the principle of these decisions. The only appeal that this record shows to have been either asked for or allowed was that of May 26, 1860. The transcript was not filed during the term next succeeding the allowance of this appeal, nor until January, 1866.

§ 1310. *The prayer for an appeal, and the order allowing it, constitute a valid appeal; the bond is not indispensable.*

Two grounds are assigned as taking the case out of the rule we have stated. 1. It is said that the appeal of 1860 was not perfected until the bond was given

under the order of November 14, 1865, and that until this was done there was in fact no appeal which required the transcript to be filed. The answer to this is, that the prayer for the appeal, and the order allowing it, constituted a valid appeal. The bond was not essential to it. It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted the appellant to give bond in this court. *Ex parte Milwaukee Railroad Company*, 5 Wall., 188. In the case of *Seymour v. Freer*, 5 Wall., 822, the chief justice says, that if, through mistake or accident, no bond or a defective bond had been filed, this court would not dismiss the appeal, but would permit a bond to be given here. And in all cases where the government is appellant, no bond is required. It is not, therefore, an indispensable part of an appeal that a bond should be filed; and the appeal in this case must be held as taken on the 26th day of May, 1860.

§ 1311. *The bond may be given with effect at any time while the appeal is alive, but the record must be filed in this court in time to save the appeal.*

It is insisted that this view is in conflict with the case of *The Dos Hermanos*, 10 Wheat., 306. We do not think so. While the argument of counsel on the merits in that case is fully reported, we have nothing from them on the motion to dismiss. The opinion of the court states that the question made was whether the appeal was in due time, and this is answered by saying it was prayed and allowed within five years from the date of the decree. The appeal was, therefore, taken in due time. It is further said that the fact that the bond was given after the expiration of the five years did not vitiate the appeal. This is in full accord with what we have just stated. The bond may be given with effect at any time while the appeal is alive. There is no question made in the present case about the appeal being taken within time. It was taken in time. But the record was not filed in the court in time to save the appeal; and that question was not made or thought of in the *Dos Hermanos* case. It is perfectly consistent with all that we know of that case, and, indeed, probable, that, though the taking of the appeal was delayed until near the expiration of the five years, and filing the bond until after that period, the transcript was filed at the next term after the appeal was taken.

§ 1312. *A recital in a citation that an appeal was obtained at a certain time does not prove that an appeal was then allowed.*

2. It is next insisted that a new appeal was taken by the proceedings of the 14th November, 1865. This, however, is in direct contradiction of the record. The petition of appellants, after reciting the former decree and the order allowing the appeal of May 26, 1860, and the death of some of the plaintiffs in the suit, and that no appeal bond had been given, concludes as follows: "Your petitioners now appear, and pray your honors to allow them to become parties to said appeal, and to perfect the same by now entering into a bond for the appeal." And the order made is, "that said petitioners have leave to perfect said appeal, so allowed at the June term, 1859, of this court, by giving bond, etc." The only appeal referred to in the petition, or the order of the court, is the appeal allowed May, 1860, and no language is used in either which refers to a new appeal, or which is consistent with such an idea. It is true that the citation speaks of the allowance of the appeal as obtained at the October term, 1865, but this recital does not prove that an appeal was then allowed, when it stands unsupported by the record. Still less can it be permitted to contradict what the record states to have been done on that subject at that time. In the case of *United States v. Curry*, the same facts almost precisely were relied on as con-

stituting a second appeal that exist in this case, including the misrecital in the citation. But the court says "that, after very carefully considering the order, no just construction of its language will authorize us to regard it as a second appeal. The citation, which afterwards issued in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order." That is precisely the case before us, and we think the ruling a sound one.

The appeal must, for these reasons, be dismissed. But we may add, that, for anything we have been able to discover in this record, the appellants have the same right now, whatever that may be, to take a new appeal, that they had in November, 1865, when the unsuccessful effort was made to revive the first one.

GARRISON *v.* CASS COUNTY.

(5 Wallace, 823, 824. 1866.)

APPEAL from the Supreme Court of the Territory of Nebraska.

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—The decree in this case was rendered on the 13th June, 1861. No appeal was prayed or allowed until the June term, 1865. At that term, on motion of the defendants below, an appeal was allowed *nunc pro tunc*, as of 13th June, 1861.

§ 1313. *Appeal allowed nunc pro tunc, no citation, transcript not filed at next term, appeal dismissed.*

There is nothing in the record which warranted the making of this order; nor, if it could have been lawfully made, would it avail the defendant, for there was no citation to the appellees, and the record was not brought up at the next term of this court. At most, it can only be regarded as an allowance of an appeal at the June term, 1865, and no citation appears to have been issued since to the appellees, nor was there any equivalent notice, nor has there been any waiver. The appeal must therefore be dismissed for want of jurisdiction.

UNITED STATES *v.* VIGIL.

(10 Wallace, 423-427. 1870.)

APPEAL from the Supreme Court of the Territory of New Mexico.

STATEMENT OF FACTS.—Motion to dismiss because the transcript was not filed at the next term after the judgment was rendered. The judgment was rendered in 1867; the United States prayed an appeal, but the clerk omitted to make the entry. In 1869 the record was amended, and the entry made *nunc pro tunc*.

§ 1314. *An entry nunc pro tunc of an appeal asked for in time, but not entered, completes the appeal.*

Opinion by MR. JUSTICE NELSON.

The action of the court below, granting the application made to it by the new district attorney, and ordering that an entry be made *nunc pro tunc* of an appeal in the cause, asked for at the January term, 1867, and that the same be granted, completed the appeal, and we think it was well sustained by the proofs before the court.

§ 1315. *An appeal will not be dismissed because the record was not filed in the requisite time, where proper excuse is shown for the delay.*

The practice relied on for the present motion for dismissal may be admitted (*Castro v. United States*, 3 Wall., 46; *Edmonson v. Bloomshire*, 7 id., 306), but there are exceptions to the rule. *The United States v. Gomez*, 3 Wall., 762, is an instance. There the proceedings on the appeal had been suspended for the purpose of a motion in the court below to set it aside, and the clerk also had refused to return and file the transcript. These facts were regarded as a sufficient excuse for the delay in filing the record in this court at a subsequent term. *The United States v. Booth*, 21 How., 512, had already established an exception. That was the case of a writ of error, and the clerk had refused to return or file the transcript, which occasioned the delay. The same principle was adopted in the case of *Alviso v. The United States*, 6 Wall., 457. The case had been dismissed at the December term, 1866, for want of a citation. A motion was made at the succeeding term to reinstate it upon the docket on the production of proof that a citation had been signed by the judge and served on the United States district attorney in due time. Objection was taken that the proof came too late, as, according to the settled practice of the court, the motion to reinstate must be made at the same term at which the motion to dismiss was granted. But it appearing from the proofs that the clerk's office, where the records were kept, had been partially destroyed by fire in July, 1866, which occasioned great confusion and some loss of the papers, the court regarded the facts as affording a sufficient excuse for the delay. Now, in the case before us, the fault of the clerk in not entering the prayer for the appeal has mainly occasioned the delay in perfecting it. It is true the vigilance of the United States district attorney might have corrected the error, but unfortunately he labored under the conviction that the appeal had been prayed for and allowed at the time the judgment was rendered, and that nothing was left to be done but the return and filing of the transcript by the clerk, and was not undeceived till his attention was called to the case by his successor. This neglect of duty by the clerk and inattention of the district attorney led to the necessity of a motion to the court to amend the record, so as to make it appear thereon that the proper steps had been taken in due time to secure an appeal on the part of the government.

§ 1316. *The prayer for an appeal in due time, although not then granted, secures the right of appeal, and no delay by the court can impair it.*

The prayer for an appeal in due time, although not granted then by the court, secures this right, and no delay by the court in its allowance can impair it. The order *nunc pro tunc* contains the allowance. It is true some considerable delay has taken place in perfecting this appeal, but the court is of opinion that it has been sufficiently accounted for from the facts and circumstances appearing on the face of the record. The government is obliged to trust the conduct of cases, in remote parts of the country, to subordinate agents, and the distance in the present instance is so great from the seat of government that a very considerable lapse of time is required to communicate with the head of the department. In such cases some indulgence must be extended to the officers thus engaged, and this difficulty of communication should be taken into consideration in determining the question of delay in conducting the legal proceedings of the government.

§ 1317. *No citation is necessary where the appeal is taken in open court.*

The want of a citation was mentioned on the argument as another ground of

dismissal, but the answer is, the appeal was taken in open court at the term in which the judgment was rendered. In such cases no citation is necessary.

Motion denied.

BRANDIES *v.* COCHRANE.

(15 Otto, 262. 1881.)

APPEAL from U. S. Circuit Court for Illinois.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is a motion to dismiss because the appeal was not taken within two years after the entry of the decree. It appears from the record that the decree was entered on the 2d of August, 1879, and on the same day the complainants prayed an appeal, which was allowed upon their giving bond according to law. No bond was ever given under this allowance, and the case was not docketed here at the October term, 1879. On the 1st of August, 1881, the circuit judge approved a bond for an appeal from the decree and signed a citation. The bond was on the same day filed with the clerk and the citation served on the 18th of August. On the 8th of October the circuit court entered an order allowing the appeal *nunc pro tunc* as of August 1st. The case was regularly docketed in this court on the 13th of October.

§ 1318. *Decree August 2, 1879; bond approved and citation signed August 1, 1881; appeal in time.*

The circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary. *Sage v. Railroad Company*, 96 U. S., 712; *Draper v. Davis*, 102 id., 370. The appeal was, therefore, taken in time. The order of October 8th was not required to give it effect.

Motion denied.

THE STEAMBOAT NEW ENGLAND.

(Circuit Court for New Hampshire: 3 Sumner, 495-509. 1839.)

STATEMENT OF FACTS.—In this case, which was a libel *in rem* for salvage, the final decree was not drawn up in form until the morning after the final adjournment. The parties, after the final adjournment, discovered a mistake in the decree, and applied for an appeal to the circuit court to have the error corrected. The district judge, doubting his power to allow an appeal except in open court, refused the application. The libelants then entered the cause as upon appeal to the circuit court, and applied to that court, by motion, to direct the clerk of the district court to enter up the appeal and the allowance of the same. Between that time and the time of the hearing on the above motion, one of the parties, on behalf of himself and the other libelants, filed a petition for a rehearing, but the petition was dismissed for want of jurisdiction.

Opinion by STORY, J.

The present case presents some points which have not been hitherto decided in this court, and have some novelty both in their principle and application. I have, therefore, taken time to consider the case with reference to the different forms in which these points have been brought before the court.

§ 1319. *A mandamus will lie to compel the district court to allow an appeal in admiralty.*

I have no doubt whatsoever, if the district court, in a case of admiralty and maritime jurisdiction, refuses to entertain the cause, or to pronounce a decree, or to allow an appeal from a decree, when interposed according to the rules prescribed by the court or justified by the general principles of the admiralty practice recognized in the courts of the United States, that this court has a

jurisdiction by *mandamus* to compel the district court to proceed in the cause, to enter a decree (not prescribing what that decree shall be), or to allow an appeal upon the proper requisitions of the law being complied with by the party. By the fourteenth section of the judiciary act of 1789, ch. 20, all the courts of the United States are clothed with "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Now, the acts above specified may be essential to the proper exercise of the appellate jurisdiction of this court over the district courts, and a *mandamus* is the proper process to effect the objects, and is agreeable to the principles and usages of law, when they are to be attained. My brother, Mr. Justice Thompson, held this doctrine in the case of *Smith v. Jackson*, 1 Paine, 453, and I entirely subscribe to his opinion on this subject.

§ 1320. *Appeals in admiralty must be taken at the term at which the decree is rendered.*

By the act of 1789, ch. 20, sec. 21, an appeal is allowed from final decrees of the district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of \$300 (since that time altered to \$50), exclusive of costs; but the appeal is allowed only to the next circuit court to be held in the district. In what mode and at what time the appeal is to be made is not pointed out by the statute. By the civil law, and also by the general practice of the admiralty courts of England, the appeal may be made *viva voce* in open court, or in writing *apud acta* at the time of the pronouncing the decree, or within ten days afterwards in writing before a notary, who authenticates the instrument of appeal. 2 Brown, Civil and Admiralty Law, 435, 437; *Norton v. Rich*, 3 Mason, 443. In America this practice has not to my knowledge ever been adopted. The uniform course, as far as I know, has been to interpose the appeal during the term or sitting of the district court at which the decree passed, and before its final adjournment, or to interpose it within some stipulated period after the term or sitting, fixed by the general rules of the court, or specially prescribed and allowed by the court in the particular case, upon the motion of the party aggrieved. And in each of these cases, if the appeal is taken within the prescribed period, it is entered upon the record of the proceedings, *apud acta*, by the clerk of the court; and when entered, it takes effect in the same manner by relation back as if entered in open court upon the record when the sentence was pronounced. If no appeal is taken in either of these ways within the proper period, and the district court is adjourned without day, then it is understood that the party waives any appeal, and the court proceeds to execute its decree; and no appeal subsequently taken by the party, even if offered or entered before the next term of the circuit court, is understood to possess any validity; but it is treated as a mere nullity. Such, at least, has been the invariable practice in this circuit; and it was fully recognized and enforced in the case of *Norton v. Rich*, 3 Mason, 443. And it appears to me that the practice is settled upon true principles; for, otherwise, the execution of the decree of the district court would be suspended until after the next circuit court, or the objects of the appeal might be in a great measure defeated by the total or partial execution of it. Be this as it may, I have no doubt whatsoever of the authority of the district court to prescribe by its rules the term wherein appeals shall be entered, and that the parties would be bound by the limitation prescribed by those rules.

§ 1321. *A motion to compel the clerk to enter the allowance of an appeal will not be granted when no appeal has been granted.*

In the present case a motion for a *mandamus* to direct the clerk to enter the appeal, as allowed by the district judge, is founded upon a total mistake of the true state of the facts and the remedial justice to which the libelants would be entitled. There is no proof whatever that the district judge allowed the appeal on the morning after the final adjournment of the court, or at any time afterwards. He disclaims it in open court, and we have the fullest authority that he never gave any directions to the clerk to enter or allow the appeal, and that he never approved any bond or security offered by the libelants for the purpose of obtaining an appeal. If the libelants were entitled to have the appeal allowed and entered after the adjournment of court upon the application made the next morning, or at any time afterwards before the next term of the circuit court, and the district judge refused it, the proper application should have been by a petition to this court for a *mandamus* to be addressed to him (and not to the clerk) to allow the appeal. The whole proceeding, on the part of the libelants, has been in this respect as irregular and incorrect as it well could be.

But, waiving all minor considerations of this sort, the real and substantial question before the court is whether the district judge had authority to allow the appeal after the final adjournment of the court, supposing the claim to have been made while the court was in session, to have such an appeal entered or a reasonable time allowed for perfecting it. As a general question, supposing the decree to have been drawn out at large and fully enrolled or entered upon the records of the court, I have no doubt, upon the authority of *Norton v. Rich*, 3 Mason, 443, and upon the principles above stated, that he had no such authority. And whatever might be the mistake of the libelants as to the nature and operation of the decree, it would have been final and obligatory upon them in this form of seeking redress. There could be no appeal, and the mode of redress must have been, if any, by another proceeding, by a libel of review in the nature of a bill of review or in the nature of a rehearing, which I shall presently have occasion to consider.

§ 1322. *Until a formal decree is entered a party is not bound to enter an appeal; but the court may grant a rehearing.*

But I understand it to be admitted on all sides at the argument that the decree of the district judge was not, in fact, drawn out or entered upon the records before the final adjournment of the court; that he merely expressed the heads and grounds of his opinion; and that the decree was afterwards formally drawn up and entered upon the records as of the term, in conformity to his minutes and by his express sanction. It seems to me that, until a formal decree was entered, the party was not bound to enter any appeal. He was not bound by the mere minutes, but was at liberty to apply to the district judge to vary his minutes and correct any errors, before the final entry of the formal decree. Nor can I entertain any doubt that the district judge was, under such circumstances, at full liberty to rehear the cause, for the purpose of varying his minutes, and correcting any mistakes made by the parties in relation to the nature and operation of his decree. Indeed, by the general practice in this circuit, the decrees and decretal orders of the circuit court, if they contain anything more than a mere affirmance of the decree of the district court, or a formal dismissal of the suit, are always submitted to the court upon a written draft, and varied and corrected and amended by the court upon the suggestion

of the parties, as well as upon its own mere motion, and in vacation as well as in term. It is usual, I believe, in the district court in Massachusetts, after an opinion has been pronounced upon the case, to give time to the parties to draw up the final decree, and to add to and vary the original minutes upon the suggestions of counsel, or upon the farther reflections of the court. And no appeal is ever entered, until after such a formal decree has been promulgated and entered on record. In this view of the actual posture of the case, it seems to me that it was not competent for the district court to direct the formal decree to be entered in vacation, as of the preceding term, without at the same time giving notice to the parties, and submitting the decree to their examination, and allowing some opportunity to them, either to rehear the cause in the discretion of the court, or to enter an appeal. In this view of the matter, it strikes me that the district judge was at full liberty, when applied to on the morning after the adjournment, either to have reheard the cause or to have allowed the appeal; since the decree had not been drawn out and entered on record during the term. He might have adopted either course, but he could not properly refuse both. He might have suspended all the proceedings and entry of the decree, and have reheard the cause at the next regular term of the district court, as unfinished business, or he might have allowed the appeal to the next circuit court. I am sure that my learned brother (the district judge) would have eagerly embraced the opportunity of re-examining the case, or of allowing the appeal, if he had not felt extreme doubts as to his authority and jurisdiction so to act. Nor do I wonder at his doubts in a case of so much novelty, where there was no definite precedent to guide or to aid his judgment.

§ 1323. *Power of a court of admiralty to grant a rehearing.*

And this leads me to the consideration of the other question, arising upon the petition for a libel of review in the nature of a rehearing. That it is competent for a court of admiralty to rehear a cause after a decree has been pronounced, pending the term, and before the proceedings have been fully enrolled or drawn up and entered on the record, I confess I do not entertain the slightest doubt. It was well remarked by Lord Stowell, in the case of *The Fortitudo*, 2 Dodson Adm., 70, cited at the bar, that the court "might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper in some cases to suffer a cause to be reopened. But it certainly would not do so, unless there existed very strong reasons to show the propriety of the measure." He added, what is very pertinent in the present case, "that mere negligence or oversight would not be sufficient ground for such an extraordinary interposition of the authority of the court. A direct case of fraud, or something equivalent to it, must be made out before such a step should be taken. His lordship was here speaking of a case where all the proceedings had been voluntarily withdrawn and abandoned by the party before any decree; and perhaps the latter part of his language ought to be limited to such a case. I own that I should have great difficulty in holding to this doctrine in the full extent of the language in which it is stated. If there has been a manifest mistake, going substantially to the merits, even with some slight ingredients of negligence on that side, and without any circumstances of fraud on the other side, I should be much inclined to direct a rehearing during the same term, while the proceedings are in paper, and the decree remains unexecuted.

But I am not aware that, after the decree has been enrolled or entered on record, and the term has passed, that any court of admiralty, at least in this country, has ever entertained an application for a rehearing. In the high

court of prize commissioners in England, it is said to be the practice never to rescind a decree after it has passed, or to open the subject anew. It has been suggested that the court would not do it even when a fraud had been practiced. But, at the same time, it was by implication admitted that another mode of redress might be adopted, meaning, I suppose, that a libel in the nature of a bill of review in equity might be sustained, for the purpose of bringing the matter either before the appellate court, or before the court in which the original decree was pronounced. I allude to the case of *The Elizabeth and the Geheimrath*, reported in 2 Acton, 57, 58, note. But see *The Flora*, 1 Hagg. Adm., 298, 304, and *The Elizabeth*, 2 Acton, 57, 58. See, also, Palmer's Practice of the House of Lords, on Appeals and Writs of Error, Introduction, pp. 50 to 69. In the case of *Hudson v. Guestier*, 7 Cranch, 1, the supreme court held that a case could not be reheard after the term in which it had been originally decided; and this rule has ever since been constantly adhered to. *Whiting v. Bank of United States*, 13 Pet., 6, 13.

But this is very different from saying that there may not be a libel in the nature of a bill of review. Commissions of review are sometimes granted in England to review the decrees of the appellate courts in ecclesiastical causes, and also in admiralty causes of civil and maritime jurisdiction, as contradistinguished from causes of prize. But such commissions are not matter of right, but are granted as matter of favor and discretion, or, as the phrase is, of the grace and benignity of the crown, upon the advice of the lord chancellor. This was so held in *Matthews v. Warner*, 4 Ves., 186, and *Eagleston & Coventry v. Kingston*, 8 Ves., 439, 465, 469, 481. In such commissions of review, it does not seem beyond the proper functions of the court in granting them to allow new pleas and proofs; and so in fact Lord Eldon seems to have thought it in *Eagleston & Coventry v. Kingston*, 8 Ves., 439, 463, 2. I am not aware, however, that any such prerogative right to issue a commission of review has ever been recognized in America. If the object is attainable at all, it must be (as it seems to me) by a libel in the nature of a bill of review in equity, addressed to the proper court having possession of the cause.

If a libel, in the nature of a bill of review in equity, would lie after a final decree in the admiralty, it seems to me that it ought properly to be governed by the same rules and principles which regulate that proceeding in courts of equity, as well from their intrinsic propriety and reasonableness as from the consideration that the bill of review had its origin in the civil and canon law, from which the court of admiralty derives its own practice and modes of proceeding. This is sufficiently apparent from what is stated by Lord Chief Baron Gilbert in his *Forum Romanum*, ch. X, pp. 182, 183, an extract from which will be found in Story's Eq. Pl., § 403, note (4), 2d ed. That extract is also important for another purpose; for it shows that while interlocutory sentences are always alterable before a definite sentence is pronounced, the definite sentence must always be in writing, and signed by the judge; and after it is so signed, it cannot be altered; but it properly becomes a matter of appeal. It thus affords an indirect confirmation of what has already been stated, that the minutes of a decree before it is drawn out at large (for it is not always signed by the judge in our practice) are always open to alteration; but the decree so drawn out, after it is approved and enrolled, is not, after the term is passed, open to be reheard. For every decree is treated, after it has been approved, as enrolled of the term at which it passed.

But to return. One of the settled rules in regard to a bill of review, and

bills in the nature of review in equity, is, that they will lie only for errors of law apparent on the face of the proceedings, or for newly discovered facts material to the rights of the party, of which he could not avail himself at the time of pronouncing the original decree. If the facts were known, and might have been used at the time of the decree, or if, though not known, they might have been known by the exercise of reasonable diligence on the part of the party applying for the review, the court will refuse it; for bills of review upon new discovered facts are not matters of right, but rest in the sound discretion of the court. See Story Eq. Pl., §§ 412-419; also *Gault v. Candalers*, Bee Adm., 64. Now, it is unquestionably true, that, in the present case, the matters relied on for a review were well known to the libelants at the time of pronouncing the original decree, and there was great negligence in not then bringing them before the court.

Assuming that there was a definite decree, which was not appealed from by the mistake and misunderstanding of the libelants of the extent and operation of that decree, I do not well see how a libel of review would have helped the matter; since it would not fall within any of the ordinary rules applicable to bills of review. And if the district judge had entertained the petition, and decided against the relief prayed, and refused to review the original decree upon the merits, as the allowance or disallowance of it was a matter of discretion, and not of right, I do not well see how an appeal would have lain from a decree dismissing the petition to this court. For, in matters of discretion, the judgment of the district judge would not be subject to the revising authority of this court in the exercise of its appellate jurisdiction. The difficulty is, that the district judge, instead of hearing the petition upon its merits, dismissed it for want of jurisdiction; and if he possessed jurisdiction, then it might become the proper duty of this court to reverse that decree of dismissal, and to remand the cause to the district court for further proceedings; since, if the district judge had jurisdiction, it is by no means certain, taking all the circumstances together, that he might not, in the exercise of his discretion, have varied his original decree; and then the respondents might have brought up the whole proceedings before this court by appeal. The question, therefore, whether the district court does possess any jurisdiction by a bill of review, or otherwise, after the term has passed, is directly presented for the consideration of this court. I have not been able wholly to satisfy my own mind upon this point. But upon the most careful reflection which I have been able to bestow upon it, the result to which I have brought my mind is, that if the district court has a right to entertain a libel of review in any case, it must be limited to very special cases, and either where no appeal by law lies, because the matter is less in value than is required by law to justify an appeal, or the proper time for any appeal is passed, and the decree remains unexecuted; or where there is clear error in matter at law; or, if not, where the decree has been obtained by fraud; or where new facts, changing the entire merits, have been discovered since the decree was passed, and there has been not only the highest good faith (*uberrima fides*), but also the highest diligence and an entire absence of just imputations of negligence; and, finally, where the principles of justice and equity require such an interference to prevent a manifest wrong. Farther than this I am not prepared to go; and I may say that, with my present impressions, I should go thus far with some hesitation and pause at every step.

But I am spared the necessity of positively deciding this point by the actual

posture of the present case. It appears to me that in no just sense can the original decree in this case be deemed a final or definitive decree. At most it is but an interlocutory decree, partaking of the character of a final decree. I agree that there are cases in which either party may appeal from an interlocutory decree, having the effect of a final decree. Thus, for example, if upon a bill to foreclose a mortgage there is a decree for a sale of the mortgaged premises, although the decree is but interlocutory, and the sale is not perfected, yet, inasmuch as it has the effect of a final decree upon the rights of the mortgagor, he may appeal from it before such sale. So it was decided by the supreme court in *Ray v. Law*, 3 Cranch, 179. But although a party, injured by such a decree, may appeal before the definitive decree is entered, and the whole proceedings are closed under it, yet it does not follow that he is bound so to do; and may not lie by, and appeal after the definitive decree. On the contrary, as I understand the law, he has an election to pursue the one course or the other. Now, in the present case, it is impossible to consider the original decree as final between the parties, as to all the matters in controversy. It was interlocutory in its character for many purposes. It directed the charges and expenses of keeping and selling the property, and the fees and charges of the officers of the court, to be first deducted from the proceeds of the sale. Now, the exact amount of these charges, expenses and fees were not ascertained, and were necessarily open to further future inquiry, and might become matters of controversy between the parties, upon which they might have a right to take the opinion of the court. Indeed, it was indispensable that this should be done, before it could be ascertained what the moiety of the salvors would be *in pecunia numerata*. And then, again, the sums belonging to the distributive shares of each salvor remained to be ascertained, and awarded to him severally, in his own proper name; for, until that should be done, he could not know what his own particular share was, and whether he was aggrieved or not by the decree, not only as to the salvage in general, but as to his particular share thereof, so as to institute an appeal severally, and for his own interest. Thus, for example, until the share of each salvor was specifically ascertained, it would be impossible to say whether the sum in controversy between him and any co-salvor, or the claimants, was enough to found the appellate jurisdiction of this court. It was indispensable, therefore, that the whole matter should have been referred to a master or auditor, to take an account, and ascertain the sums due to all parties according to the principles of the original decree; and for that purpose to hear all the parties, and make a report to the court. Such a report, when made, would be open to contestation by any of the parties in interest; and until confirmed by the court, there would not be a sufficient basis on which to found a final decree, absolute in its nature, upon all the rights of all the parties.

It seems to me, therefore, that the district judge had a clear remaining jurisdiction in the premises for this purpose; that the original decree was not so final as without an appeal to supersede the necessity of further proceedings; and consequently, that as the original cause has never been wholly removed from his jurisdiction by any appeal, he is at liberty to rehear it, and to vary or modify that decree, and is bound to go on and perfect it by an absolute definitive decree. When such a decree shall be rendered by him, if unsatisfactory to any of the parties, it will of course be open to appeal under the usual circumstances. My judgment, therefore, is, that the decree of the district court on the petition ought to be reversed; and, as all the proper materials are not

now before this court to enable it to act definitely upon the whole rights of the parties, that the case ought to be remanded to the district court for further proceedings. If the parties, with a view to prevent further delay, shall agree that the original cause shall be deemed to stand, before this court, as if an appeal had been originally entered, and allowed in the district court, I shall have no difficulty in acting upon such an agreement, instead of remanding the cause. Otherwise a special mandate will be sent with the cause to the district court.

THE ORIENTAL.

(Circuit Court for Ohio: 2 Flippin, 37-49. 1877.)

Opinion by SWAYNE, J.

STATEMENT OF FACTS.—This is a motion to dismiss an appeal in admiralty, upon the ground that the appeal was not taken in time. In other words, that it was not taken to the term of the circuit court next succeeding the term of the district court at which the decree was rendered. The decree was rendered by the district court at the January term, to wit, on the 23d of February, 1876, and that term closed on the first Monday in April, 1876. The then next term of the circuit court began on the first Tuesday in April, 1876. The appeal was taken January 12, 1877, to the April term, 1877, of the circuit court. That is, to the fourth term, and not to the first term, there being three intervening terms. The statutes in this connection, which it is necessary to consider, are, first, the act of 1789, section 21, which is as follows: "From final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of \$300, exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district."

§ 1324. *Time of taking appeals in admiralty under the acts of 1789.*

Under that provision it has been held that appeals from the district court in such cases were properly entered at the term of the circuit court begun next after the entry of the decree of the district court, although the term of the district court, during which the decree was entered, had not been ended when the term of the circuit court was begun. In the *United States v. Certain Hogsheads of Molasses*, 1 Curtis, 276, it was held further that if an appeal be not taken to the term of the circuit court held next after the term of the district court at which the decree was entered, the right to appeal is lost, and that ends the case, so far as the question of appeal is concerned. 2 Curtis, 236.

§ 1325. — *under the act of 1803.*

The next act to be considered — as it regards the question under consideration — is the act of 1803, section 2, the language of which is more comprehensive than in the act of 1789. That act is confined expressly to decrees of admiralty. The language of the act of 1803 is: "From all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of \$50 " (reducing the amount of \$300, required in the act of 1789, to the sum of \$50), "shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered," etc. Under this provision it was held, also, in *Montgomery v. Henry et al.*, 1 Dall., 50; 3 Mason, 442, and *United States v. Haynes et al.*, 2 McL., 155, that the appeal must be taken to the next term of the circuit court succeeding the term of the district court during which the decree was rendered, and that it cannot be taken subsequently. It will be observed — a matter to which I have ad-

verted already — that the language of the second section of the act of 1803 is much larger than the corresponding language in the act of 1789. Yet it has been held by the supreme court of the United States, that notwithstanding the generality of the terms in this act, it made no alteration in the law of 1789 as it respects appeals to the circuit court, except in reducing the sum or matter in controversy to \$50, on which such appeals may be allowed. The words, “all final judgments or decrees,” refer to judgments or decrees in causes of admiralty and maritime jurisdiction, and in such causes only has this act authorized an appeal from the district court to the circuit court. *United States v. Nourse*, 6 Pet., 496; *United States v. Haynes et al.*, 2 McL., 155, and *Montgomery v. Henry et al.*, 1 Dall., 50.

§ 1326. — *effect of the act of 1872.*

So stood the law of the United States, and such were the adjudications from the passage of the first judiciary act of 1789 on the subject, till the passage of the act of June 1, 1872. The second section of that act, or so much of it as is necessary to be considered in this connection, and which, it is claimed, abrogates or repeals the provision, which has been read, of the act of 1803, which was a re-enactment — as before stated — of the provision on that subject of the act of 1789, and substitutes, as it is claimed, one year for the time prescribed by those acts for the taking of appeals in admiralty from the district court to the circuit court, after regulating appeals from the circuit court to the supreme court of the United States, proceeds as follows: “No judgment, decree or order of a district court, rendered after this act shall take effect, shall be reviewed by a circuit court of the United States, upon like process or appeal, unless the process is sued out, or the appeal taken, within one year after the entry of the judgment, decree or order sought to be reviewed. *Provided*, that where a party entitled to prosecute a writ of error, or to take an appeal, is an infant, or *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken within the period above designated, after the entry of the judgment, decree or order, exclusive of the time of such disability.”

Now, to see the proposition which is presented in its true light, it is necessary to recur to the provision already adverted to in the act of 1789, and in the act of 1803, upon this subject, and then to consider the change which it is claimed this act of 1872 makes in the pre-existing law as to the time within which appeals in admiralty from the district court to the circuit court are proper to be made. As before remarked, the act of 1789 required such appeals to be taken to the next term of the circuit court. That provision remained untouched from 1789 to 1803, and then, although the language employed is broader, yet according to the interpretation given to it by the supreme court in 6 Pet., 496, the act of 1803 simply re-enacted, without any change, the provision on that subject of the judiciary act of 1789. That provision remained in force from 1789 to 1872. This is unquestionably so. It has not been controverted in the argument which has been submitted to this court.

It is claimed that by this act of 1872, in the first place, the time to appeal in the class of cases to which the one under consideration belongs, was extended to the period of one year. No matter how small, or what the circumstances of the case may be, a party, instead of being required by way of hastening the progress of the case to its final determination, as was required by its previous laws, might rest perfectly quiet for the period of one year. In the next place, it is equally clear, in the event of that interpretation being adopted,

that in the event the party entitled to an appeal were "an infant, or *non compos mentis*, or imprisoned, such appeal might be taken within the periods designated after the entry of the judgment, exclusive of the term of such disability." That is to say, if there were a devolution of the right of appeal upon an infant in the progress of the litigation, or if an infant were a party *ab origine* and entitled to an appeal, or a person *non compos mentis* were entitled to an appeal in any way, or a person imprisoned; the infant, it is obvious, under that construction of the statute, would be entitled to twenty-one years, besides the year allowed to a person under no disability, less the day of his birth; and if a person entitled to an appeal should be insane and continue so for fifty or sixty years, upon being restored to sanity, no matter when, he might take an appeal, and so, too, the imprisoned. This would be the necessary consequence of that construction of the intendment.

§ 1327. *Repeals by implication must clearly appear.*

Now, as adverse to the proposition contended for, independent of these considerations, it is to be remarked that this provision of the act of 1872 does not repeal the provision in question of the act of 1803. There is no language in the act — nothing explicit — to that effect. If there is any such repeal, it is a repeal by implication, and the rule of law is, that, where a repeal by implication is claimed, the conflict and repugnancy between the earlier and later statutes — the later working such alleged repeal — must be so clear and palpable, and so irreconcilable, as to leave no room for a reasonable doubt that it was the intendment of the legislative mind in enacting the latter law to repeal the former. I am of the opinion that this is not such a conflict and that this case is not within that character. But this act of 1872 was itself repealed by the Revised Statutes of the United States. It contained substantially both the provision in question of the re-enacting act of 1803, and also of the act of 1872, which is relied upon to have wrought the effect here insisted.

§ 1328. *Effect of the re-enactment of a prior act by a later one.*

In turning to the provisions of the Revised Statutes in this connection, they will be found as follows: Section 631. "From all final decrees of a district court in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of \$50, exclusive of costs, an appeal shall be allowed to the circuit court next to be held in such district, and such circuit court is required to receive, hear and determine such appeal." Here for the first time equity cases, to be appealed from the district court to the circuit court, are placed upon the same footing with decrees in admiralty, and that is the only departure in this act from the act of 1803; otherwise the language is substantially the same. And it is a well settled rule of interpretation (see 2 Hill, 702; 24 Wend., 47), that where a prior act is abrogated by a later one, and the prior one is re-enacted by the later one, unless there be a very material change in the language, such as to exclude the reasonable construction that the subsequent act was intended merely to be put in substitution for or take the place of the prior act, it is to be held still to be substantially the same law. That rule applies here. For all the purposes of this case, this second section of the act of 1872 must be simply a re-enactment of the provision upon the same subject of the act of 1803.

§ 1329. *Appeals in admiralty must be taken to the next term of the circuit court.*

Further, in this connection, the meaning of the terms, "an appeal shall be allowed to the circuit court next to be held in such district," has been settled

by repeated adjudications. As that language was found in the act of 1789 and also in the act of 1803, they must necessarily be held on authority as well as reason to have the same meaning. Then here is this provision in the Revised Statutes, clear and explicit, viewed from any standpoint, and in any light, leaving no room for doubt that congress by this act required, as it had required by the act of 1789, and again by the act of 1803, that appeals in this class of causes—that is, appeals in admiralty from the district court to the circuit court—must be taken to the next term of the circuit court after the rendition of the decree in the district court, or an appeal cannot be taken at all. It is held that having enacted that long-continued provision in accordance with the long-continued policy of the legislation of congress upon the subject, the legislature that enacted these Revised Statutes in a body, by a subsequent provision abrogated and annulled that provision *in toto*. That is the contention upon the other side; and that is founded upon the re-enactment into these Revised Statutes by congress of the provision, which has been remarked upon already, of the act of 1872, and which is found in section 635. “No judgment, decree or order of a district court shall be reviewed by a circuit court on writ of error or appeal, unless the writ of error is sued out or the appeal is taken within one year after the entry of such judgment, decree or order.”

The same line of argument applies here that applied to this provision of the act of 1872, before its re-enactment into these Revised Statutes, and what has been said upon this subject already need not be repeated. But there are some further remarks proper to be made beside the points and considerations that there is no express repeal, no express purpose by this provision to change that provision. It has prevailed from 1789 down to the enactment of the act of 1872, if that act made the change contended for. Here are these two sections found in their proximity, one to the other. It seems to me, in the light of all these considerations, without going over the ground that has been gone over already, viewing the subject in the light of the adjudications and rules upon the point of repeals by implication, that it is entirely incredible that congress should have meant by section 635 to repeal section 631 so far as the time for appeal is concerned, and that section contains nothing else. I say it is incredible that congress ever enacted one provision by section 631, and on the same page could have intended to enact a repealing provision—repealing by implication section 631. The considerations which have been adverted to, and which I will not consume time by repeating, it seems to me fully sustain this rule, and exclude any other conclusion upon the points here under consideration.

§ 1330. *The intent of the legislature constitutes the law.*

But it is said that the language is, “no judgment, decree or order of a district court,” and that this term “decree” necessarily includes decrees in admiralty, and the inference follows, if this be so, that there is a repeal by implication to the extent contended. Firstly, I have to remark, that it is a canon of statutory construction, asserted many times in the best considered adjudications, that the intent of the legislature—if it can be ascertained—constitutes the law; and in connection with that proposition, that a thing may be within the letter of the law clearly and not within its meaning, and that a thing may be without the letter of the law and yet within its meaning, and in either case the intent thus established constitutes the law; and judicial determinations to this effect are very numerous. A very well considered case upon this subject is to be found in *Slater v. Cave*, 3 O. S. Rep., 80. Now under that view of the subject, if it were necessary I should hold that the word “decree”

here has no meaning, and that it would be the duty of the court to exclude it from consideration, and to consider it inadvertently inserted as having no effect in fixing the construction of the language found in this statute. And again, see the case of the *United States v. Nourse*, 6 Pet., which has been adverted to. The act of 1803 went in comprehensiveness beyond the act of 1789, in this: that the act of 1789 was confined in terms to decrees in admiralty. The act of 1803 uses the language, "all judgments or decrees," and yet the supreme court of the United States in the case mentioned had no hesitation in saying that the act of 1803 — notwithstanding this difference — was intended to be confined by the law-making power to decrees in admiralty alone. That no judgment, technically as such, and no decrees, technically as such, was intended to be embraced in that language, except simply decrees in admiralty.

On the authority of that case, as well as other numerous adjudications, if it were necessary, I should have no hesitation in holding in the light of the entire context of these several provisions, that it was the intent of the legislature not to extend the time within which appeals in admiralty should be taken, but that having fixed the rule upon that subject, then out of abundant caution it was the intent of the legislature to provide that all other judgments or orders of the district court, or decrees, if there could be any such besides decrees in admiralty and in equity, should be prosecuted within one year from the time of the entry of the decree, and should not be prosecuted after that time.

It has been said with very great force of argument, and I confess that for the moment I was very much impressed by the suggestion, that it is a canon of interpretation, that if it be possible to do so, every word and phrase in the statute shall be taken. Such is to be presumed to be the intention of the legislature. This may be the rule on the subject of repeals by implication. If the legislature had intended to make so improvident and material a change under the circumstances, it can very well be taken that in the act of 1872 a repeal of the provision in question of the act of 1803 would have been expressly made, and that section 631, which was a re-enactment of the act of 1803, would not be found in these Revised Statutes. But it is by no means to be admitted that this latter canon of interpretation may not be applied here consistently with the maintenance of integrity to both of these provisions — 631 and 635. There follows section 631, before reaching 635, this provision: "Final judgments of a district court in civil actions, where the matter in dispute exceeds the sum or value of \$50, exclusive of costs, may be re-examined and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error."

Now, as regards such final judgments, there is no limitation as to the time in which they may be reviewed, so far as I am advised, except by this one year limitation in section 635. That section declares, "No judgment, decree or order of a district court." There is material, so far as judgments are concerned, upon which this limitation can operate. Then, as it regards orders, that term is not necessarily to be considered here, but it is obvious it will occur to any one, on a moment's reflection, that there may be a very great variety in the earliest proceedings which may be taken up for review. I need not remark further upon that subject. An order is not always applicable to a decree in admiralty. That, therefore, does not touch the point here under consideration. There is no difficulty, then, in giving this section 635 full operation as to judgments or orders without interfering in any way with provision 631.

Now, as to decrees. It has been said that there is no decree which can be rendered by a district court, except a decree in admiralty and a decree in cer-

tain causes in equity, and that, therefore, according to the contention which has been insisted upon, this limitation of one year applies necessarily to decrees in admiralty and decrees in equity. That, we think, is a mistaken view of the fact. I have not had the time to examine this point as thoroughly as I should have desired if time had been allowed me. There were, during the war, provisions in force, under which the property of rebels was forfeited, and many decrees to that effect were entered, but the act is no longer in force. There is the case of the *United States v. Miller*, which I have not had time to examine, but which I recollect perfectly well. In that case a decree of forfeiture was entered. So in the case of the *United States v. Conrad* a large amount of his real estate was confiscated under the statutory provisions of the United States, touching the property of acting rebels against the government, and a decree of forfeiture was entered at New Orleans by the district court. It was brought to the supreme court of the United States, as was the case of the *United States v. Miller*, and the decrees in both cases were reversed, but they were decrees in forfeiture, and not a decree in admiralty or a decree in equity.

Now, it is sufficient in this connection to remark generally, and without going in detail, that the subsisting revenue laws, both as they regard custom duties and as they regard internal revenue duties, so to speak, provide proceedings for forfeitures, and would not be, in the judgment of this court, a misnomer; on the contrary, as I understand the law, it would be in accordance with the settled principles of law to term the final adjudication of the court a "decree," upon the subject of forfeiture, against the respondent or against the libellant, dismissing the libel or information, as the case may be.

Now, in further illustration of that particular view of the subject, I advert to rule 22 of the supreme court of the United States, established for the government of the inferior courts of the United States in their action in this class of cases. That rule is as follows: "All informations and libels of information, upon seizure for any breach of the revenue or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information, or libel of information, shall also propound, in distinct articles, the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause, at the return day of the process, why the forfeiture shall not be *decreed*."

It is not necessary to advert to any particular legal statutory provision denouncing forfeitures in the various cases to which these provisions have been extended; it is sufficient to remark generally that they are very numerous. I have already remarked, and repeat, that it would be no misnomer; on the contrary, it is sanctioned by the language of the rule, and it is in accordance with the settled principles of law on the subject, to hold that the final judgment of the district court in most, if not in all, cases of forfeiture would be properly characterized by terming it a *decree*, the jurisdiction being limited to the district court. Now apply that reasoning to the language of this section, 635, premise —

First. Section 631 has explicitly required an appeal to be taken to the *next* term of the circuit court after it was rendered, as was required in

the act of 1789, and of 1803 and 1872, and as required in section 631 of this act.

Further, "no judgment, decree or order." The decrees to which this language refers, or what is meant by the use of that epithet, may well be held to be decrees other than decrees in admiralty and in equity — decrees in the class of causes provided for and contemplated by the rule which has just been read. Now that harmonizes the two sections. It avoids the absurdity, or the improbability, perhaps, would express the idea more accurately, that this provision which unquestionably appears from 1789 to 1872, was intended to be abrogated, and the long period that might intervene in consequence of the disabilities prescribed in that section, should be imported into our admiralty system of the jurisprudence of the United States. It cannot be done in the manner in which it is insisted upon it has been done. It would be held to have been done inconsistently with any sound or reasonable construction, either upon the ground of authority, reason or principle, all of which I know are adverse, and in my judgment conclusive against the proposition contended for. The motion to dismiss must therefore prevail, and the appeal is dismissed.

UNITED STATES *v.* THE BRIG GLAMORGAN.

(Circuit Court for Massachusetts: 2 Curtis, 236-239. 1855.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This was a libel of information for a forfeiture of the brig, by reason of her employment in the slave trade. The district court decreed a forfeiture and sale of the vessel and cargo; and on a return of the warrant of sale, and payment of the proceeds into the registry, at the September term, 1854, made a final decree, distributing the net proceeds equally between the United States, and the commander, officers and crew of the brig Perry, a public armed vessel of the United States, who made the seizure of the Glamorgan, and ordering each moiety to be paid out of the registry accordingly; and it was paid, one moiety to the United States, and the other to the proctor of the private persons interested. Subsequently, the secretary of the navy not being satisfied of the correctness of this distribution, the district attorney, at the following December term of the district court, applied to the judge to reëxamine so much of the decree as made distribution. The judge heard the attorney, and upon that, made an entry on the record, that, having examined the order, and considered the same, he was of opinion it was correct, and therefore does not revoke or alter the same. An appeal was then claimed by the United States, and disallowed; and the question now is, whether the appeal should have been allowed.

§ 1331. *Appeals from final decrees of the district court must be taken to the next circuit court.*

The twenty-first section of the judiciary act of 1789 (1 Stats. at Large, 83) allows an appeal from final decrees of the district court to the next circuit court to be held for such district. The final decree in this case was made on the 8th of September, 1854. The next term of the circuit court, held in this district, was on the 15th of October, 1854. This appeal was not claimed until the December term of the district court, and could not then be allowed, because it was too late to take an appeal to the term of the circuit court held next after the entry of the final decree. See *Privateer Montgomery v. The Betsy*, 1 Gall., 416; *Norton v. Rich*, 3 Mason, 443; *United States v. Certain Hogsheads of Molasses*, 1 Curt., 276.

§ 1332. *A final decree of the district court, rendered at a former term, cannot be opened or set aside so as thereby to confer a new right of appeal upon a party, or revive such right lost by lapse of time.*

But it is argued that the final decree was opened, at the December term, on motion of the district attorney; and that the right of appeal is to be considered as thereby revived, or a new right created. Without intending to give any opinion as to what it was fit for that court to do, in respect to hearing an argument on that motion, and without knowing what it would have done if it had come to the conclusion that the order of distribution was erroneous, I am of opinion that it is not in the power of the district court to open or set aside a final decree, regularly entered at a former term of the court, and thereby confer a new right of appeal upon a party, or revive a right lost by lapse of time. The power of a court of admiralty over its final decrees, except in the cases provided for in the fortieth rule, made by the supreme court to regulate the practice in admiralty, is somewhat unsettled. It has been very little discussed in England, and until the decision of Doctor Lushington in *The Monarch*, 1 W. Rob., 21, it cannot be said that any thing respecting it was determined, though the subject had been before the court of admiralty in the *Vrouw Hermina*, 1 Rob., 163, and before the court of appeals in *The Elizabeth*, 2 Acton, 57. See, also, *The Herstelder*, 1 Rob., 119, n.; *The Fortuna*, 4 id., 278; *The Flora*, 1 Hag., 298, 304. It was discussed by Mr. Justice Story in *The Steamer New England*, 3 Sumn., 495. In the case of *The Monarch*, Dr. Lushington held that the high court of admiralty had the same power to vary its decrees, before they were enrolled, that was possessed by other courts of equity.

§ 1333. *The right to appeal from a decree of the district court is lost if the appeal be not taken to the term of the circuit court held next after the making of the decree. (a)*

So far as I am aware, no court, either of law or equity, has exercised a summary control over its judgments, or decrees, after their enrollment, and after the expiration of the term at which they were entered. In our practice, decrees in the admiralty, as well as in equity, being matters of record, are deemed to be enrolled as of the term of the court at which they are finally passed. *The Steamboat New England*, 3 Sumn., 495; *Dexter v. Arnold*, 5 Mason, 303, 310, 311; *Whiting v. The Bank of the United States*, 13 Pet., 6, 13. And after a final decree has been drawn up and entered, and the court has adjourned without day, no further control can be exercised by the district court over it, save by force of the fortieth rule, already mentioned, or by a libel of review, respecting which I give no opinion. In the case of *The Steamboat New England*, Mr. Justice Story, speaking of such a case, says: "There could be no appeal; and the mode of redress must have been, if any, by a libel of review," which he proceeds to consider. In *Washington Bridge Co. v. Stewart*, 3 How., 424, the supreme court disclaimed all power to change its decrees after the expiration of the term at which they are entered. And in the *Bank of the United States v. Moss*, 6 How., 31, it was held that the circuit courts could not set aside a judgment of a former term on motion, even for want of jurisdiction. A district court, sitting in admiralty, is within the same rule. My judgment is, that the claim of an appeal was rightly disallowed by the district court; that this court has no jurisdiction over the case and can pronounce no opinion on the merits.

(a) Appeal dismissed, because not taken to the next term of the circuit court. *United States v. \$5,100 in Specie*,* 1 Woods, 14.

NORTON v. RICH.

(Circuit Court for Massachusetts: 3 Mason, 443-445. 1824.)

Opinion by STORY, J.

The only modes of appeal which are known in courts of admiralty (at least as far as my researches have enabled me to ascertain) are appeals made in open court, *sedente curia*, immediately after the decree, and then they are *apud acta*, or appeals made, within ten days after the decree, before a notary. 1 Bro. Civ. and Adm., 494-498; 2 Bro. Civ. and Adm., 435-439; Oughton, tit. 277, 289, 294; Clerk., Praxis, tit. 53 and note; Cod., lib. 7, tit. 62, § 6. This latter mode has never been in use in America, and has been expressly declared to be inadmissible by the supreme court. 3 Dall., 6, note. The judiciary act of 1789, ch. 20, has expressly prescribed a period of five years within which appeals may be made from the decrees of the circuit court to the supreme court, and the mode in which it is to be done, by a citation to the adverse party, etc. But it has provided no mode as to appeals from the decrees of the district courts to the circuit courts, confining the appeal only to the *next* circuit court. This omission seems to indicate a difference of intention in congress as to appeals from the circuit and district courts, leaving appeals from the latter to be regulated by the discretion of the court or to be made only at the time of the decree. The case, therefore, being untouched by statute, must be decided upon general principles. The acts of 1792, ch. 36, and 1793, ch. 22, have given to all the courts of the United States authority to make such regulations for their practice and business as they may deem expedient; and, doubtless, under these acts, as appeals from the district courts are unprovided for by statute, these courts may by rule prescribe the times and modes of making them. They may require appeals to be made in open court before an adjournment *sine die*, or afterwards, within a fixed time, in the clerk's office. It would be unreasonable to suspend the execution of a decree during a whole vacation; and after execution once authorized and carried into effect, it would be inconvenient to allow appeals to the circuit court.

§ 1334. *An appeal from the district court must be taken before the adjournment of the court.*

In this district no regulations as to appeals have ever been made by the district court. The uniform course, from the earliest period, has been to make the appeal in open court, *apud acta*, before the adjournment of the court. This course of practice is equivalent to a rule of the court; and must be considered as directory to all parties. Wherever a desire for further time to consider of an appeal has been asked for, it has been readily acceded to by an adjournment of the court for this purpose. If I were to grant the petition in this case it would be assuming the right to regulate the proceedings of the district court in a matter plainly within its general jurisdiction and authority. The decision of the district judge is in conformity to the general practice. No evil has hitherto grown out of it; and I do not feel myself at liberty to disturb it. If any inconvenience should arise, it can easily be obviated by a special application to, or a general rule of, the district court. *Petition dismissed.*

STRODE v. THE STAFFORD JUSTICES.

(Circuit Court for Virginia: 1 Marshall, 162-165. 1810.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The sole question in this case is whether the limitation of five years can be pleaded to a writ of error in fact, and this question

depends on the construction of the twenty-second section of the original judicial act. That section contains the following clause: "And writs of error shall not be brought but within five years after rendering or passing the decree complained of."

§ 1335. *The limitation of five years for taking a writ of error does not apply to writs of error coram nobis.*

That this clause, standing unconnected with other provisions, which necessarily limit its operation, would extend to writs of error in fact, will not be controverted. But it is intermingled with other clauses which essentially influence its construction. For reasons urged at the bar, which I will not repeat, it is perfectly clear that the writ of error given in the twenty-second section is not a writ of error *coram nobis*, but a writ to be issued from a superior court for the purpose of correcting the errors of an inferior jurisdiction. This is admitted by the counsel for the defendant; but he would obviate the inference to be drawn from it by contending that writs of error for the purpose of correcting errors in fact lie from the supreme to the circuit court, and from the circuit to the district court. In aid of this argument, he states a doubt expressed by one of the judges of the court of appeals respecting the power of that court to reverse the judgments of inferior courts for errors in fact. If, instead of a doubt, the jurisdiction had been averred, that opinion would have been totally inapplicable to this case, because the law by which the court of appeals is constituted gives them cognizance of all causes brought before them by writ of error generally, without specifying the nature of the writ or restricting their powers to errors in law; but the judicial act expressly provides that "there shall be no reversal in either court," "for any error in fact." Consequently the act of congress must be entirely disregarded before the supreme court can take cognizance of errors in fact, committed in an inferior court, in a case brought up by writ of error.

This positive prohibition of the act is supposed to be overruled by the exceptions to the clause which limits writs of error. They are, that "in case the person entitled to such writ of error be an *infant*, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability." It is contended that these cases are necessarily cases in which the error must be an error in fact, and, therefore, the act of limitations must be construed to extend to writs of error in fact. But the truth of the original proposition cannot be conceded. Judgments may certainly be rendered against infants, *femes coverts*, persons *non compos mentis*, or imprisoned, which may be erroneous in point of law; and for these errors a writ of error may be sued out, the right to which is not barred by the act of limitations. There is, then, no necessity for giving these words a meaning repugnant to the plain terms and intention of the act.

§ 1336. *Construction of statutory enactments. Each part must be construed with reference to the others.*

But it is contended that the general words: "And writs of error shall not be brought but within five years after rendering the judgment or decree complained of," are unrestricted, and apply to all writs of error whatever, whether such as congress then had in contemplation, or such as were at the time entirely out of the mind of the legislature. This would be a manifest departure from the common principles of construction, and from what appears to be the plain intent of the act. These words, though general, are not such as to show that the term "writ of error" is used in this instance in a more extended sense

than is affixed to it throughout the section, and also through the twenty-third and twenty-fourth sections. They are, "and writs of error," that is, writs of error which are the subjects of the law. It is probable that, had a more extended operation been intended, some terms would have been used indicative of that intention. Instead of the words "and writs of error," we should, most probably, have found the words, "all writs of error whatever," or "all writs of error, whether brought in a superior court or in the same court," or some other terms, indicative of an intention to regulate writs which were not the objects to which the intention of the legislature was at the time directed.

But it is urged that one sentence of a law cannot be affected by the context. I should as soon have expected the declaration that one sentence of a will was not to be affected by other parts of the will. In each, the intention of the maker is to be affected, and, consequently, each instrument must be wholly inspected. Without reasoning upon this subject, the books abound with authorities, which seem to be conclusive. In 1 Inst., 381, Lord Coke says: "It is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers." He afterwards adds: "And this exposition is *ex visceribus actus*." The instances which illustrate this axiom, in the construction of statutes, are numerous. They are to be found in all books which touch on the subject, and many have occurred in the supreme court of the United States. The statute of England is inapplicable, because it is not connected with other clauses.

The demurrer is sustained, and the judgment of reversal must be rendered.

§ 1337. **In general.**—Where a decree is ordered to be entered up, and afterwards a decree is filed in the case, which is finally amended by substituting another, the substituted decree is the final one, and an appeal within five years from its entry is in time. *United States v. Gomez*,* 1 Wall., 690. See § 1282.

§ 1338. Where application is made for an appeal within the proper time, the appeal will not be defeated by delay in the subsequent proceedings. *United States v. Adams*,* 6 Wall., 101. See § 1286.

§ 1339. Judgment was rendered October 31, 1871, and the writ of error was issued November 10th, returnable on the first Monday in December, and was served by filing in the clerk's office. The writ was dated October 16th, before the rendition of the judgment, but this was held to be a mistake that did not vitiate the writ. *O'Dowd v. Russell*,* 14 Wall., 402.

§ 1340. An appeal in equity, admiralty, and prize causes may be taken at any time within five years from the final decree, subject to the saving contained in the twenty-second section of the act of 1789. *The San Pedro*, 2 Wheat., 132. See the case, §§ 2754-55. See § 1288.

§ 1341. A writ of error issued in September may bear teste of the February term preceding, notwithstanding the intervention of the August term between the teste and the return of the writ. *Blackwell v. Patten*, 7 Cr., 277.

§ 1342. A statute of Maryland, as to the time within which appeals must be prosecuted, construed. *Scott v. Law*,* 2 Cr. C. C., 530.

§ 1343. **Effect of a state of war.**—The limitation prescribed by the act of 1789 for appeals to the supreme court did not run during the rebellion against a party residing out of a rebellious state in which the judgment or decree was rendered; the act of March 2, 1867, prescribing a limitation of one year from its passage within which to bring all appeals or writs of error which were suspended or interrupted by the rebellion, is an enabling act, and not a restraining one. *The Protector*,* 9 Wall., 687.

§ 1344. An appeal from a circuit court in a state afterwards in rebellion, which was not filed within five years after the rendition of the decree, less the time during which such state was in rebellion, will be dismissed as having been taken too late; and for the purpose of computing the time, the date of the opening of the war will be taken to be the date of the proclamation embracing such state in the blockade, and the date of the close of the war will be held to be the date of the proclamation declaring that the war had closed in such state. *The Protector*, 12 Wall., 702.

§ 1345. A second appeal will lie at any time within five years from the entry of the decree, though the first appeal was dismissed for an informality in prosecuting it. *Yeaton v. Lenox*, 8 Pet., 123. See § 1276.

§ 1346. A bill of review lies for errors apparent in the decree only, but evidence referred to in the decree is part of it. It is in the nature of a writ of error, and the five years' limitation of writs of error applies to it. *Whiting v. Bank of United States*, 1 McL., 251. See § 1294.

§ 1347. In admiralty.—An appeal from the district to the circuit court on an information in admiralty is properly entered in the circuit court at the next term after the appeal is taken, though at that time the term of the district court at which the judgment was entered has not ended. *United States v. Certain Hogsheads of Molasses*, 1 Curt., 276. See § 1290.

§ 1348. From probate court of Utah.—An appeal from the probate court of Utah to the territorial district court in town site cases under the territorial law may be taken within one year. *Cannon v. Pratt*, 9 Otto, 620.

§ 1349. The filing of a petition of appeal in the district court is an entry of the appeal within § 4982 of the Revised Statutes. *Platt v. Preston*, 8 Fed. R., 182.

§ 1350. The circuit court acquires jurisdiction of an appeal though the appellant neglects for more than ten days to file his declaration of appeal in the circuit court, if all the other steps necessary to perfect the appeal are duly taken. *Barron v. Morris*,* 16 N. B. R., 377.

IX. TIME OF FILING TRANSCRIPT.

SUMMARY—*Appellant prevented from filing transcript in time*, § 1351.—*Dismissal; second appeal within the five years*, § 1352.—*Case may be dismissed at any time before final hearing*, § 1353.—*Return and filing*, §§ 1354, 1355.

§ 1351. The general rule is, that the transcript must be filed in the supreme court, and the case docketed, at the term succeeding the appeal, in order to give the court jurisdiction. But where the appellant, having seasonably procured the allowance of an appeal, is prevented from obtaining the transcript by the fraud of the other party, or by the order of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches or want of diligence in his efforts to prosecute the appeal. *United States v. Gomez*, §§ 1356-1360. See §§ 1283, 1284, 1286.

§ 1352. The transcript of an appeal must be filed in the supreme court and the case docketed at the term next succeeding the appeal, or the appellee may docket and dismiss; but in such case the appellant may take another appeal within five years from the date of the decree. *Steamer Virginia v. West*, §§ 1361, 1362. See § 1276; also XIX. 3.

§ 1353. If the transcript is not filed and the cause docketed during the term to which it is made returnable, the appeal or writ of error may be dismissed at any time before the final hearing, either by the court itself, or on motion of the appellee or defendant in error. *Grigsby v. Purcell*, §§ 1363, 1364.

§ 1354. A writ of error must be made returnable on a day certain, and the transcript must be filed at the next succeeding term; the want of a proper writ of error is not waived by appearance. *Carroll v. Dorsey*, §§ 1365, 1366.

§ 1355. A writ of error must be made returnable to the first day of the term; and if defective in this particular it is not amendable, nor can the supreme court cure the defect by issuing a citation. *Insurance Co. v. Mordecai*, §§ 1367, 1368.

[NOTES.—See §§ 1369, 1370.]

UNITED STATES *v.* GOMEZ.

(3 Wallace, 752-767. 1865.)

APPEAL from U. S. District Court for Southern California.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Claim of the appellee, as described in his petition to the land commissioners, was for a tract of land situated in California called *Panoche Grande*, of the extent of four square leagues, and he alleged that the tract was granted to him in the year 1844 by Governor Manuel Micheltorena. Unable to exhibit his title papers, as required by the act of congress upon the subject, he relied upon parol proof to show their existence, loss and contents. Commissioners rejected the claim, and the claimant appealed to the district court, where the claim for the whole tract was confirmed. Final decree, as

amended, was entered on the 5th day of February, 1858; and on the 25th day of August, 1862, the appeal of the United States was allowed.

1. Appellants insist that the claim is utterly without merit, and that the decree of the district court should be reversed. On the other hand, the claimant denies that this court has jurisdiction of the cause, and contends that the appeal should be dismissed. Principal difficulty in the case grows out of certain proceedings in the cause, which have taken place since it first made its appearance in this court. Docket entries for the December term, 1858, show that the case was first presented here at that term by the claimant as an appeal not prosecuted, and that it was, on the production of the record, on his motion, dismissed in conformity to the rules of court for the want of prosecution. Mandate of the court dismissing the appeal was, on the 18th day of March following, delivered to the assignee of the claimant.

2. Nothing further was done in the cause in this court until the December term, 1859, when the attorney-general filed a motion to rescind the decree dismissing the cause and to revoke the mandate, basing the motion upon the ground that the decree and mandate had both been procured by misrepresentation and fraud. Minutes of the clerk, also, show that he filed his motion on the 27th day of January, 1860, and that the claimant, on the 2d day of March following, filed three other motions. First motion of the claimant was for *mandamus* to the district court, to compel the judge to file the mandate and permit the execution of the decree confirming the claim. Second motion was for *mandamus* to compel the district court to dismiss an application before it to open the decree and grant a rehearing. Third motion was for *mandamus* to compel the surveyor-general to survey the land confirmed by the decree. All those motions were heard at the same time, and the court overruled the several motions of the claimant, and entered a decree rescinding the decree dismissing the appeal, and revoked and canceled the mandate as moved by the attorney-general. *United States v. Gomez*, 23 How., 326. Affidavits offered showed that no appeal had been taken by the United States, and that the statement that such an order had been made as was exhibited in the transcript and filed in the case was false. They showed not only that the United States had not appealed, but that a motion filed by their special counsel for a rehearing was still pending in the district court. Decision of the court, therefore, was, that the appeal was not before the court when the cause was docketed and dismissed.

3. Next appearance of the cause here was at the December term, 1863, which is the appeal now before the court. Record was filed and the cause docketed on the 29th day of February, 1864; and on the 31st day of March following the claimant filed a motion to dismiss the appeal, because, as therein alleged, this court had no jurisdiction "to hear and determine the same." 1. Because the five years within which an appeal can be taken had expired before the appeal was claimed and allowed. 2. Because the entry of the appeal was made without authority, and had been set aside. 3. Because there was no citation. 4. Because the appeal was not seasonably prosecuted. 5. Because the transcript of the record was incomplete. Parties were heard upon that motion, and on the 18th day of April, of the same year, it was unanimously overruled. *United States v. Gomez*, 1 Wall., 698.

4. Coming to the present term of the court, the docket entries show that the motion under consideration was filed by the claimant on the 9th day of February last. He moved the court to strike out certain matters printed in the rec-

ord, and requested the court to determine the fourth cause assigned in the motion of the preceding term for the dismissal of the cause, which, as he alleges, was not noticed, considered or decided when the motion was overruled and denied. Both branches of the motion were subsequently argued by counsel, and on the 26th day of February last the motion was overruled; but the chief justice, in announcing the result, remarked that the question of jurisdiction would be open when the cause should be argued upon the merits. Since that time the cause has been reached in the regular call of the docket and has been fully argued on both sides. Claimant still denies the jurisdiction of the court, and the counsel have reargued all the questions of jurisdiction presented for decision in the original motion to dismiss.

5. Three of those questions, to wit, the first, third and fifth, were carefully examined and decided by this court during the same term in which the motion was filed, and it is only necessary to refer to that decision as the final determination of the court. *United States v. Gomez*, 1 Wall., 698. Special mention was not made of the second question presented in the motion, because what was said by the court, in disposing of the first question, rendered any further remarks upon that subject unnecessary. Express statement of the opinion is, that the appeal to this court was allowed on the day therein specified. But the suggestion is, that the court did not decide the fourth question presented for decision, and the suggestion, so far as it applies to the opinion of the court, is certainly well founded.

§ 1356. *The general rule is that the transcript must be filed and the case docketed at the term next succeeding the appeal.*

Fourth objection to the jurisdiction of the court was, that the appeal, even if legally taken and allowed, became null and void for the want of seasonable prosecution. General rule, as established by repeated decisions, undoubtedly is, that the transcript must be filed here, and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. *Steamer Virginia v. West*, 19 How., 182. Argument upon that subject is unnecessary, as the rule has been reaffirmed at this term in an opinion delivered by the chief justice. Unless the case, therefore, falls within some exception to the general rule of practice, as derived from the act of congress allowing appeals, the motion of the claimant must prevail.

§ 1357. — *but the rule does not apply where the party has been prevented from obtaining the transcript by fraud.*

6. Certain exceptions to that general rule are recognized and allowed, which are as well established as the rule itself. They are admitted as indispensable limitations to guard against fraud and circumvention, and to prevent a failure of justice. Where the appellant, having seasonably procured the allowance of the appeal, is prevented from obtaining the transcript by the fraud of the other party, or by the order of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches, or want of diligence, in his efforts to prosecute the appeal. *United States v. Booth*, 21 How., 512. Order allowing the appeal in this case was entered on the 25th day of August, 1862; but on the 6th day of October following, a stipulation was entered in the minutes, that the transcript should be withheld until the next term of that court, in order to give the claimant an opportunity to move the court to set aside the order of appeal. Such a motion was accordingly made by the claimant on the 1st day of the succeeding December; and on the 4th day of the same month the court directed that the order allowing

the appeal should be vacated and set aside. Reason for vacating the appeal as assigned was, that the five years had expired before it was allowed, which is directly contrary to the decision of this court, and consequently must be considered as overruled. *United States v. Gomez*, 1 Wall., 699. Although the decision of the court was erroneous, still the proceedings under the motion had the effect to prevent the appellants, in the meantime, from obtaining a copy of the transcript. Session of this court for that term commenced four days before the order of the district court was announced, vacating the appeal. Suppose the explanatory facts stopped here, it might well be assumed that it was the conduct of the claimant and the action of the court which prevented the appellants from seasonably perfecting the appeal; but they do not, by any means, stop at that point. Appellants demanded the transcript on the 10th day of October next after the appeal was allowed, and the clerk agreed that it should be prepared and delivered. Failing to obtain it, they, on the 2d day of December following, again demanded it, and then, for the first time, were informed by the clerk that he would not furnish the document. Present claimant, on the 6th day of April, 1863, instituted a proceeding in the district court to enjoin the clerk and district attorney from making out and certifying the transcript of the record, upon the ground that the order allowing the appeal was entered without authority of law, and that the appeal had been properly revoked and set aside. Result was, that the judge refused to grant the injunction; but he reiterated his opinion that no appeal was pending, and remarked that the procuring copies for the United States, in such a case, was a fraud upon the government and was not to be tolerated. Six times the demand was made of the clerk for the transcript, and the request, as often as it was made, was refused. Such demand was made by the special counsel of the United States, and by the district attorney, and by the authority and direction of the attorney-general. Throughout, the clerk refused to furnish the transcript, but finally consented to furnish the attorney-general a copy of each paper in the case; and those separate papers, it is understood, were appended together and duly certified by the district attorney, as appears in the record. 12 Stats. at Large, 320.

7. Assuming the facts to be as stated, it is obvious that the case falls within the exception to the general rule, as recognized and established in the case of *United States v. Booth*, to which reference has already been made. Writ of error in that case was returnable at the December term, 1855, and it was accompanied by a citation requiring the defendant to appear on the first day of that term. No return, however, was made at that time, and on the first day of February following, the attorney-general filed affidavits, showing that the writ of error and citation had been duly served, and that the state court had directed the clerk to make no return. Whereupon this court passed an order commanding the clerk of the state court to make the required return, and the cause was continued; but none such was ever made. Unable to procure any such return, the attorney-general was allowed, on the 27th day of February, 1857, to file the copy of the record produced when the application was made for the writ of error, and on the 6th day of March, following, the court ordered that it should have the same effect as if it had been regularly filed by the clerk. Evidently the power to retain jurisdiction in the case before the court is even better supported than it was in that case, because the transcript in this case is duly certified under a new provision in a subsequent act of congress. 12 Stats. at Large, 320.

§ 1358. *Mandamus lies to compel the granting of an appeal or the production of a transcript.*

8. *Mandamus* unquestionably is the proper remedy where the appeal is refused, and it is an appropriate remedy to compel the production of the transcript. Strong doubts are entertained, however, whether it would have been an adequate remedy in this case, because it is more than probable that, if the motion had been made, the affidavits showing the refusal of the clerk to furnish a copy would have been met by counter affidavits showing that the appeal had been vacated; and in that state of the case it would have been difficult for the court to have decided what was right and proper between the parties, without the opportunity of inspecting the record. Grant, however, that the appellants might have had an adequate remedy in a motion to this court for a *mandamus*, still it is clear that they had a right, under the circumstances of this case, to invoke the benefit of the special provision in the act of congress referred to as a cumulative means of securing their rights. Application was accordingly made to the district attorney, and he, without delay, made the certificate exhibited in the record. Conclusion, therefore, is, that the case, in either point of view, is regularly before the court, and all the motions to dismiss are overruled.

§ 1359. *Upon a claim for lands under an alleged Mexican title, where there is no concession, grant, nor proof of possession, the decision must be adverse.*

9. Regarding the case as regularly before the court, it becomes necessary to examine the merits of the claim. Some suspicion attaches to the claim, because it is made for four leagues of land, whereas the only document introduced in support of it, which is of the least probative force, represents the original claimant as having asked for but three leagues. Document referred to purports to be the petition of the claimant to the governor, and there is appended to it the usual *informe*; but there is no concession or grant, nor is there any satisfactory evidence that any title of any kind was ever issued by the governor to the claimant. He states in his petition to the land commissioners that he obtained the map in the record from the proper officers of the department; but the alleged fact is not satisfactorily proved. Four witnesses were examined by the claimant before the land commissioners, but only one of the number pretended that he had ever seen the grant, and his statements are quite too indefinite to be received as satisfactory proof. Instead of proving possession under the grant, it is satisfactorily shown that he never occupied it at all; and it is doubtful if he ever saw the premises during the Mexican rule. Land commissioners rejected the claim, but, before it came up for hearing in the district court, his attorney had been appointed district attorney of the United States; and the proofs show that he conveyed two leagues of the land to the district attorney. Circumstances of the confirmation of the claim in the district court are fully stated in the opinion of this court given when the mandate was revoked and recalled. *United States v. Gomez*, 23 How., 339. Comment upon those circumstances is unnecessary, except to say that the confirmation was fraudulently obtained.

§ 1360. *A fraudulent decree will sustain an appeal for the purpose of correcting errors.*

Although the decree was fraudulently obtained, still, inasmuch as it is correct in form, it is sufficient to sustain the appeal for the purpose of correcting the error. Party who procured it cannot be allowed to object to its validity as a means of perpetuating the fraud, especially as he did not appeal from the

decree. The decree of the district court is therefore reversed, and the cause remanded, with directions to dismiss the petition.

STEAMER VIRGINIA v. WEST.

(19 Howard, 182, 183. 1856.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This is an appeal from the circuit court for the district of Maryland. The decree from which the appeal has been taken was passed by the circuit court on the 17th day of November, 1855, and the appeal was prayed on the same day in open court. But it was not prosecuted to the next succeeding term of this court, and no transcript of the record was filed here during that term. But a transcript has been filed at the present term of this court and the case docketed. And a motion is made to dismiss it upon the ground that the appeal is not legally before this court, according to the act of congress regulating appeals.

§ 1361. *Transcript must be filed at next succeeding term. (a)*

The construction of this act of congress, and the practice of this court under it, has been settled by the cases of *Villabolas v. The United States*, 6 Howard, 81, and the *United States v. Curry*, 6 Howard, 106. The transcript must be filed in this court and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction. This case must therefore be dismissed.

§ 1362. *On the dismissal of an appeal the party may take a second appeal within five years from the date of the decree.*

But the dismissal does not bar the appellant from taking and prosecuting another appeal at any time within five years from the date of the decree, provided the transcript is filed here and the case docketed at the term next succeeding the date of such second appeal.

GRIGSBY v. PURCELL.

(9 Otto, 505-508. 1878.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This was a suit to enforce the provisions of a trust deed executed by J. Warren Grigsby to secure "all the debts of the house of Taylor, Shelby & Co., created since the 14th day of July, 1857," for which he was liable. The bill was filed by part of the creditors for themselves and such others as should come in and prove their claims. In the progress of the cause a reference was had to a master, who in due time made his report. At the hearing before the master, the appellant, Susan P. Grigsby, the wife of J. Warren Grigsby, appeared as a creditor and proved her claim. To the report of the master she excepted; and upon the hearing the court decreed in her favor to the amount of \$21,753.05, and directed the payment of that amount to her from the fund in court. The remainder of her claim was rejected. This decree was rendered at the February term, 1875, of the circuit

(a) Writ of error dismissed because not returned and entered at the return term. *Hamilton v. Moore*,* 3 Dal., 371; *Blair v. Miller*,* 4 Dal., 21. Service of a writ of error before the return day is good, and though not returned to the first term, the appearance of the defendant in error will waive objections to the irregularity. *Wood v. Lide*,* 4 Cr., 180. Appeal dismissed because the record was not filed within the first sixty days of the next term. *German v. United States*,* 5 Wall., 825

court, and on the 15th day of the month of February. On the 23d of the same month, and during the term, an entry was made in the cause granting an appeal prayed by J. Warren Grigsby and Susan P. Grigsby; but it does not appear that any bond for costs or for a *supersedeas* was ever executed. On the 19th of April, 1875, Mrs. Grigsby receipted to the receiver in the cause for the amount of the decree in her favor, and on the 6th of May, still during the February term, an appeal prayed by W. H. Thomas was granted, but, so far as appears, no bond executed. The October term, 1875, of this court closed by adjournment on the 8th of May, 1876. Neither of the appeals were docketed during that term, and the transcript of the record was not filed in court. So far as appears, no attempt was made to do so, and no excuse has been given for the delay; but on the 12th of August, 1876, before the commencement of the next term, the transcript was filed by Mr. and Mrs. Grigsby, and their appeal docketed. That of Thomas was not docketed until during the present term. Nothing further was done in the case by either party until December 14, 1878, when the appellees moved to dismiss the appeal of Grigsby and wife because it was a joint appeal, the appellants not being united but opposed in interest. Printed briefs for and against this motion were filed by the respective parties, and on the 23d of December the motion was overruled. The attention of the court was not called to the delay in filing the transcript and docketing the appeals until January 19, 1879, when the causes were reached in their regular order on the docket. The counsel for the appellees then suggested the delay, and moved to dismiss on that account.

§ 1363. *If a transcript is not filed and the cause docketed during the term to which an appeal is returnable, the appeal may be dismissed.*

Sec. 997 of the Revised Statutes, which is a substantial re-enactment of a similar provision in sec. 22 of the judiciary act of 1789 (1 Stat., 84), requires that "there shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." Appeals are subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. Rev. Stat., sec. 1012; 2 Stat., 244. Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed. *Hamilton v. Moore*, 3 Dall., 371; *Blair v. Miller*, 4 Dall., 21; *Steamer Virginia v. West*, 19 How., 182; *Castro v. United States*, 3 Wall., 47; *Same v. Gomez*, *id.*, 752; *Mesa v. United States*, 2 Black, 721; *Mussina v. Cavazos*, 6 Wall., 355; *Edmonson v. Bloomshire*, 7 *id.*, 306. After the cases of *Hamilton v. Moore* and *Blair v. Miller*, an attempt seems to have been made in *Wood v. Lide*, 4 Cranch, 180, to adopt a less stringent rule, but the uniform current of decisions since is all the other way; and in *Edmonson v. Bloomshire* we considered the practice so well established as to make it better "to resort to the legislature for its correction than that the court should depart from its settled course of action for a quarter of a century." There are, however, exceptions to the rule, as in *United States v. Gomez*, *supra*, where there was fraud, and in *United States v. Booth*, 21 How., 506, where the state court to which the writ was directed ordered the clerk to disregard the writ and make no return; but in all such cases it must appear that the appellant or the plaintiff in error has not himself been guilty of laches or want of diligence. These ap-

pellants bring themselves within none of the exceptions which have ever been recognized. There has been no fraud or circumvention, and the whole difficulty arises from their own negligence alone. It does not appear that the clerk was called upon to make the transcript until after the term of this court to which the appeal was returnable had closed. No security for costs ever was given, and in fact nothing was done towards the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance. To entertain the cause under such circumstances would be to encourage an addition to the already burdensome delay necessarily attendant upon litigation in this court on account of the crowded state of the docket. Instead of this, we should, as we do, insist on promptness and activity by all who come here to obtain a re-examination of judgments and decrees against them.

§ 1364. *At any time before the hearing advantage may be taken of a failure to docket a cause in time. Appearance is no waiver. (a)*

It by no means follows, as seems to be supposed by counsel who resist this motion, that if parties appear and without objection go to a hearing in a cause docketed after the return term, our judgment will be void for want of jurisdiction. The real objection is not that this court has no jurisdiction, but that the plaintiff in error or the appellant, as the case may be, has failed to duly prosecute his suit; and this objection may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error at any time before hearing. Mere appearance does not amount to a waiver. In this case the objection was taken in time.

Appeal dismissed.

CARROLL *v.* DORSEY.

(20 Howard, 204-208. 1857.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—A motion has been made to dismiss this case for want of jurisdiction.

It appears that an action of ejectment was brought by the plaintiffs in error against the defendants, in the circuit court of the district of Columbia, and upon the trial the verdict and judgment was for the defendants. The particular day on which the judgment was rendered is not given; but it is stated as a judgment on the third Monday in October, in the year 1851, which, it appears, was the first day of the term. But it also appears that two exceptions were taken at the trial by the plaintiffs, one dated the 20th and the other the 22d of November; so that the judgment would seem to have been rendered a few days before the December term, 1851, of this court. No steps were taken to bring it here for revision until the 27th of May, 1853, when an appeal bond was approved by the presiding judge, which recites that the plaintiffs had obtained a writ of error returnable to the next term of this court and filed it in the clerk's office. No such writ of error, however, appears to have been issued. A paper purporting to be a writ of error was issued after the commencement of December term, 1853; that is, on the 17th of that month. This paper is made returnable to the supreme court in general terms, without naming any

(a) In *Owings v. Tiernan*, 10 Pet., 24, it is held that if a case is docketed before a motion to dismiss is made, the motion will be denied; so, also, in *Bingham v. Morris*,* 7 Cr., 99. In *Wood v. Lide*,* 4 Cr., 180, it was held that the failure to return a writ of error to the first term is waived by an appearance by defendant in error.

day or even any term at which the defendants were required to appear. The transcript before us also contains a citation, signed by the presiding judge, and the service is acknowledged by the attorney for the defendants. But the citation, like the paper purporting to be a writ of error, specifies no day or term at which the defendants are required to appear, and, moreover, is not itself dated. No further proceedings were had to bring up the case until December term, 1856, when the record was filed without any other writ of error, bond or citation; and at the same term the defendants, by their counsel, appeared in this court.

§ 1365. *A writ of error must be made returnable on a certain day, and must be filed at the next term of the court.*

It is evident from this statement that the case is not before the court. The act of 1789, sec. 22, requires that the writ of error should be made returnable on a certain day therein named; and, indeed, upon common law principles, a certain return day in a writ of error is essential to its validity. There is, therefore, no process by which the case is legally brought before this court, and consequently we have no jurisdiction over it. And if the process was free from exception, and if a writ of error, such as is known and recognized by law, had been issued and filed in the circuit court, yet no transcript of the record was filed here until nearly three years afterwards; and this court have repeatedly said that the transcript of the record must be filed at the term next succeeding the issuing of the writ or the taking of the appeal, in order to bring the case within the jurisdiction of this court.

§ 1366. *Want of citation may be waived, but not want of regular writ of error, or due filing of transcript.*

But it is said on behalf of the plaintiffs in error that these are mere irregularities which were waived by the general appearance at the last term, and that the motion at the present term is too late. Undoubtedly the appearance of the defendants at the last term, without making a motion to dismiss, cures the defect in the citation. The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears it shows that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may, therefore, waive it, if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of the *United States v. Yulee et al.*, 6 How., 603; but the court at the same time said that the appearance did not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground. The same point was again decided in the case of *Buckingham et al. v. McLean et al.*, 13 How., 150, in which the court said that a motion to dismiss for want of a citation must be made at the first term at which the party appears, and is too late if made at a subsequent term. But the want of a writ of error, such as is prescribed by the act of congress, stands on different ground. And in the case of the *United States v. Curry*, 6 How., 118, the court held that where the power of the court to hear and determine a case is conferred by acts of congress, and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law nor to change or modify them.

Upon this ground the case is not legally before us, and must be dismissed for want of jurisdiction.

INSURANCE COMPANY *v.* MORDECAI.

(21 Howard, 195-202. 1858.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.— The defendant in error, on the 8th of October, 1858, obtained a judgment against the plaintiffs in error in the district court of the United States for the western district of Virginia. On the 18th of the same month, this writ of error was sued out, and made returnable on the second Monday in January then next ensuing — in other words, it was made returnable on the second Monday in January, in the present term of this court, and the defendant in error was cited to appear here on that day. A motion has been made to dismiss the case, upon the ground that, in order to bring the judgment of the district court before this court, the writ of error must be returnable on the first day of the term, and that a writ of error with a different return day is not authorized by law, nor by the rules and practice of this court.

§ 1367. *A writ of error must be made returnable to the first day of the term. (a)*

By the act of congress of May 8, 1792 (1 Stat., 278), it was made the duty of the clerk of this court to transmit to the clerks of the several circuit courts of the United States the form of a writ of error, to be approved by two of the judges of this court, and the clerks of the circuit courts were by that act authorized to issue writs of error agreeably to such form, as nearly as the case would admit. And it is by virtue of this act alone that the clerk of a circuit court, or of a district court exercising the jurisdiction of a circuit court, is authorized to issue a writ of error to remove a case to this court. Immediately after its passage, the form of a writ of error was adopted and transmitted to the clerks of the circuit courts, pursuant to its provisions, and that form made it returnable on the first day of the term of this court next ensuing the issuing of the writ — that is, on the day appointed by law for the meeting of the court. The form then adopted has never been changed, nor are we aware of any case in which a writ of error with a different return day has been sanctioned by this court. It is unnecessary, therefore, to inquire what may be the rules of practice in this particular in other courts. The legal return day was fixed under the authority of the act of 1792, and a writ of error issued by the clerk of a circuit court, or of a district court exercising the powers of a circuit court, with a different return day, or differing in any other material respect from the form transmitted, is without authority of law, and will not bring up the case to this court. The rules of the court have been framed in conformity with this return day of the writ, and the rule which permits a defendant in error to docket and dismiss a case if the transcript is not filed by the plaintiff within the time therein limited, necessarily presupposes that the writ is returnable on the first day, and that the plaintiff might then file the transcript. He may, it is true, return the writ with the transcript at any time during the term, unless the case has been docketed and dismissed, when it cannot afterwards be filed without the special order of the court. But this permission to return the writ, and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time — as one day, and that day the first of the term. The writ before us was obviously issued by some oversight of the clerk, who followed the form used

(a) In *Porter v. Foley*,* 21 How., 393, the writ was not made returnable to the first day of the term, and the court refused to remand for the purpose of having the writ and citation amended, but gave the party leave to withdraw the transcript to be used with proper legal process in bringing the case up.

when this court met on the second Monday in January, without, it would seem, advertg to the circumstance that the day of meeting had been changed by law, and that the first Monday in December, and not the second Monday in January, was the first day of the term.

§ 1368. — *and if the writ is defective in this particular it cannot be amended, nor can the supreme court issue a new citation.*

Neither can the writ of error be amended. The defendant in error was cited and admonished to appear on the second Monday in January, and if the writ were amended, it could not be maintained with this citation, for the defendant must be cited to appear on the same day that the writ is returnable. The citation is the regular and familiar process from a court of justice, notifying and requiring the defendant to appear and make his defense, if he has any, on the return day of the writ. And the common law process of a writ of error made returnable on one day, and a summons to the defendant to appear at another, would be without precedent, and would be as objectionable as the entire absence of a citation. And the want of proof that the defendant was cited has always been held to be a fatal defect in the process prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision — a defect which can be cured only by the voluntary appearance of the party entered on the record. Nor can this mistake be corrected by a citation from this court. The act of congress requires it to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court. The case must therefore be dismissed for want of jurisdiction in this court.

§ 1369. **Filing transcript.**— The transcript of the record must be filed at the next succeeding term of the court. *Carroll v. Dorsey*, 20 How., 204. See the case, §§ 1365-66. A failure to file the transcript at the next term is fatal to the appeal. *The Lucy*, 8 Wall., 307. See the case, §§ 194-196.

§ 1370. **The ten days** after judgment within which a writ of error is to be filed do not commence to run from the filing of the opinion of the court denying the motion for a new trial, but from the entry of the rule for judgment in the clerk's office. *Hatch v. Coddington*,* 5 Blatch., 523.

X. APPEAL AND WRIT OF ERROR BONDS.

1. *In General.*

SUMMARY — *Executed to a deceased party*, § 1371.— *Supreme court may enlarge security*, § 1372.— *Condition held sufficient*, § 1373.— *Must be approved by justice*, § 1374.— *Time given by supreme court to file bond*, § 1375.— *Power of lower court after case is docketed*, § 1376.

§ 1371. An appeal bond executed to a deceased party instead of the administrator is irregular; but the court will permit a sufficient bond to be filed. *Bigler v. Waller*, §§ 1377-1379.

§ 1372. The supreme court may enlarge the security in a writ of error bond where the judgment is for a certain sum of money; but it has no such power where a judgment has been rendered in ejectment, on which nominal damages only are awarded. In such case the court cannot enlarge the security to cover damages which a plaintiff may recover in an action for mesne profits, or for any other losses which he may allege he will sustain by being kept out of possession of the land by any delay there may be in prosecuting the writ of error. *Roberts v. Cooper*, § 1380. See § 1400.

§ 1373. An appeal bond conditioned that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in the supreme court," is sufficient under § 1000, Revised Statutes. *Gay v. Parpart*, § 1381.

§ 1374. The security required upon appeals and writs of error must be taken by the judge or justice. A bond approved by the clerk alone is void; but time will be given to file a sufficient bond. *O'Reilly v. Edrington*, § 1382. See § 1392.

§ 1375. Where no appeal bond was given at the time of taking the appeal, the supreme court gave sixty days within which to file a bond for costs. *Anson v. Blue Ridge R. Co.*, § 1383. See § 1401.

§ 1376. When a bond for an appeal is accepted and the case is docketed in the supreme court, the jurisdiction of the lower court is gone; it cannot vacate the allowance of the appeal and require additional security. *Keyser v. Farr*, § 1384. See § 1408.

[NOTES.— See §§ 1385-1419.]

BIGLER *v.* WALLER.

(12 Wallace, 142-150. 1870.)

APPEAL from U. S. Circuit Court, District of Virginia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.— The record shows that the appellant, on the 14th of June, 1866, instituted a suit in equity in the circuit court against William Waller and Robert Saunders, for the cause of action set forth in the bill of complaint. Among other things he alleged that he entered into an agreement in writing with William Waller for the purchase of certain real estate lying in the county of York and state of Virginia; that the said respondent, on the 10th of May, 1853, executed to the complainant a deed of the said real estate, and that the complainant, on the same day, made the cash payment as stipulated in the agreement, and gave to the respondent, at the same time, his obligation to pay the balance of the purchase money at the times therein specified; that on the 22d of June, in the same year, the complainant executed to the other respondent a trust deed of the premises to secure the balance of the consideration which he agreed to pay for the real estate, as stipulated in that obligation; that he went into possession, made valuable improvements, and continued to make the stipulated payments until April, 1861, when the war broke out, and he was compelled to leave the state; that after he left the state, Waller authorized the other respondent, as such trustee, to make sale of the real estate, and the complainant alleges that the trustee effected the sale without publishing the notice required by the terms of the deed of trust, and that he satisfied the said obligation out of the proceeds of the sale, and has failed to account to the complainant for the balance of the proceeds; that Waller became the purchaser of the real estate at that sale; that he immediately took possession of the same, together with certain personal property of great value belonging to the complainant; that he sold the same and converted the proceeds to his own use, and applied the same to the payment of the balance due on the said obligation; that he also rented the real estate and received large sums of money as rents; that he, the complainant, subsequently succeeded, through the aid of our military authorities, in recovering possession of the real estate, but that he found it in a ruinous condition; that since that time, to wit, on the 11th of November, 1865, Waller instituted a suit against him on the said obligation in the supreme court of the city and county of New York, to recover what he claims to be due thereon; that subsequently the other respondent posted up, in the county where the real estate is situated, a notice "that he would, at the request of said Waller, in a few weeks, sell said real estate."

Based on these and other similar allegations, the charge is made that Waller may induce the trustees so to act in regard to the sale of the premises as to cheat and defraud the complainant; therefore he prays that the trustee may be enjoined from selling the said real estate, and that the said Waller may be

enjoined from assigning his interest in the said obligation until the suit in the supreme court of the city and county of New York is determined, and for an account, and that the respondents may be required to deliver up all deeds and papers in their possession concerning said sale. Suffice it to say, without entering into details, that such proceedings were had that a decree was entered that the appellant should pay to William G. Waller, administrator of William Waller, deceased, the sum of \$17,377 in coin, and costs, to the defendants. Dissatisfied with that decree the complainant appealed to this court, which is the case involved in the motion.

Pending the suit here the appellees have appeared specially and filed a motion to dismiss the appeal upon two grounds: (1) Because the citation is addressed to the original parties, one or both of whom deceased before the final decree. (2) Because the bond given to prosecute the appeal is executed to a deceased respondent and not to the administrator in whose favor the decree was entered.

§ 1377. *An irregularity in addressing a citation to a deceased party may be waived.*

Undoubtedly the citation is irregular, as it should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecuted. Where a party dies before the appeal is allowed and prosecuted, the suit should be revived in the subordinate court, and the citation, as matter of course, should be addressed to the proper party in the record at that time. Notice is required by law, and where none is given, and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed, but the defect may be waived in various ways, as by consent or appearance or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party. *Bacon et al. v. Hart*, 1 Black, 38. Unquestionably the attorney of record may also waive service, and acknowledge notice on the citation, as in that behalf he represents the party. *Grosvenor v. Danforth*, 16 Mass., 74; *Adams v. Robinson*, 1 Pick., 461. On the citation in this case is the following indorsement: "I hereby acknowledge service of the within citation. James Alfred Jones, counsel for the defendants in this cause in the circuit court of the United States for the district of Virginia." Viewed in any reasonable light, it seems to the court that the attorney knew that the appeal was allowed by the court and was prosecuted by the appellant, which is the only purpose intended to be effected by the citation. Having been counsel in the cause, the party signing that certificate must have known that the suit had been revived, as that proceeding took place before the final decree was entered. Such a service would be sufficient beyond all doubt if there had been no error in the form of the citation, and as that objection is merely a formal one, we are all of the opinion that it must be considered as waived by the circumstantial language of the certificate signed without objection by the attorney of record in the circuit court.

§ 1378. *Requisites of an appeal or writ of error bond stated.*

2. Appeals from decrees of the circuit court to this court are allowed where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000, and the provision is that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error. 2 Stats. at Large, 244. Good and sufficient security must be taken by every justice or judge who signs the citation, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good;

and in order that the writ of error may operate as a *supersedeas* and stay execution, the writ must be served by a copy thereof being lodged for the adverse party, in the clerk's office where the record remains, within ten days, Sundays exclusive, after the judgment was rendered or the decree was passed. 1 Stats. at Large, 85. Such a service is not required in an appeal, but the requirement is that the appeal must be taken and allowed in cases where it is required to be allowed, within the same period of time, and in both cases; that is, whether the cause is removed by writ of error or by appeal, the plaintiff in error or the appellant must give the required security within the ten days, Sundays exclusive, in order that the writ of error or appeal may operate as a *supersedeas*. "What is necessary is that the security be sufficient, and, when it is desired to make the appeal a *supersedeas*, the security must be given within ten days from the rendering of the decree." *Rubber Company v. Goodyear*, 6 Wall., 156; *Catlett v. Brodie*, 9 Wheat., 553. Unless taken within the ten days an appeal cannot be made to operate as a *supersedeas*, but a party appealing within that time may not desire that the appeal shall have that effect, and in that event all that can be required of him is that he shall give good and sufficient security for costs, including "just damages for delay." Rule 32; 1 Stats. at Large, 404.

§ 1379. *An appeal bond must be executed to the opposite party; but a defect may be remedied by filing a new bond.*

Argument to show that the bond in this case is irregular and defective is unnecessary, as it is clear that it should be given to the opposite party or parties in the suit, but it does not follow, by any means, that the appeal must be dismissed. On the contrary, it is the constant practice of the court to allow such defects to be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court, in view of all the circumstances when the application is made. *The Dos Hermanos*, 10 Wheat., 306; *Brobst v. Brobst*, 2 Wall., 96. Even if the appeal is not dismissed, it is suggested by the appellees that it should not be allowed to continue to operate as a *supersedeas*, because the appeal bond or the required "good and sufficient security" was not given within the ten days from the date of the decree; but it is a sufficient answer to that suggestion at this time to say that no such question is before the court. Such a question may arise hereafter, but the decision of the court at present is that the motion to dismiss must be granted unless the appellant file a sufficient appeal bond in the usual form within ten days in the same sum as that required by the chief justice who allowed the appeal.

Leave is granted to the appellees to file such a bond, but the court does not decide what the effect will be, nor that it is or is not competent for this court in such a case to grant a *supersedeas*, as no such application is before the court.

ROBERTS v. COOPER.

(19 Howard, 373-375. 1856.)

ERROR to U. S. Circuit Court, District of Michigan.

Opinion by Mr. JUSTICE WAYNE.

STATEMENT OF FACTS.—In this case Roberts, who is the plaintiff in error, on the allowance of the writ of error, gave security in the sum of \$1,000, conditioned that he would prosecute his writ to effect, and answer all damages and costs if he failed to make his plea good. Cooper now declares that the bond for \$1,000 is not sufficient to answer all the damages and costs if Roberts

should fail to prosecute his writ to effect, and refers to an affidavit filed by him as the basis of this motion to show that fact. Mr. Vinton, counsel of Cooper now moves the court for an order requiring Roberts to give additional security in the sum of \$25,000, or such other sum as the court may deem to be sufficient to cover all damages which Cooper may suffer if the writ of error should not be prosecuted with effect.

The case between the parties is for the recovery of land in ejectment. Cooper represents that he holds the legal title to the land in controversy in trust for the National Mining Company, incorporated by the legislature of the state of Michigan, to carry on the business of mining for copper, and that he is the secretary and treasurer of the company; that he instituted this suit to recover the possession of this land for them, that they might have the use and occupation of it for their chartered purposes. It is also stated by the affiant that a decision had been given by the supreme court of the United States at its last term, on a writ of error to the circuit court for the district of Michigan, between the same parties in controversy, for the same land, establishing, on the merits of the case, the title of the affiant to the land, and that the mining company, in consequence of it, had prepared to prosecute its mining business to the extent of their ability upon the land, which is known to contain a very valuable deposit of copper ore, which could be worked with great profit; and that the company was prevented from working the deposit in consequence of the pending writ of error, which Roberts sued out upon a judgment which had been rendered in this case against him and in favor of the legal title of the affiant, in the circuit court of the United States for the district of Michigan at its last term. And the affiant also states that the damages which the company will sustain by the delay caused by the writ of error will amount to at least the sum of \$25,000, and to a larger amount if Roberts shall not prosecute his writ of error to effect.

§ 1380. *The supreme court cannot enlarge the security in a writ of error bond in an action of ejectment.*

We have not been able to find a precedent for this motion. The counsel making it did not cite one, but relied upon that part of the twenty-second, twenty-third and twenty-fourth sections of the judiciary act of 1789, the first of which declares that every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, which, considered in connection with the twenty-third and twenty-fourth sections, he thought empowered this court to grant the motion. In our interpretation, and the proper application of those sections, regard must be had to the nature of the action upon which a writ of error has been brought, and to the damages to which a plaintiff who has had a verdict and judgment may be entitled. If it be for a money demand, on which a sum certain has been given by a judgment, it is the duty of the judge, who signs the citation on a writ of error, to take care that good and sufficient security is given. Should it be neglected, and it shall be brought to the notice of this court, when such a case is before it upon a writ of error, upon a motion to enlarge the security, this court would take care that the party claiming its intervention should have the full benefit of the security intended by the law on a case when the writ of error was a *supersedeas*. But when a verdict and judgment upon it has been had in ejectment, on which nominal damages are only awarded (except in cases between landlord and tenant, and that in England, in virtue of the statute of

1 George IV, ch. 87, sec. 2), and a writ of error has been sued out by the defendant, and security given, as has been done in this case, this court cannot interfere to enlarge the security to cover damages which a plaintiff may recover in an action for mesne profits, or for any other losses which he may allege he will sustain by being kept out of the possession of his land by any delay there may be in prosecuting the writ of error. Besides, this court cannot award damages in any case brought to it by writ of error, or require an enlargement of a bond given upon a writ of error, except as it is authorized to do in the twenty-third and twenty-fourth sections of the judiciary act of 1789, neither of which comprehend cases of apprehended losses, except when they are a part of the original suit, and then only "when its reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed or the matter to be decreed are uncertain; *in which case* the cause is remanded for a final decision."

We must deny this motion. It is not provided for by any legislation of congress. And the utmost extent for which the enlargement of security upon nominal damages in ejectment has been found necessary in England, is given by the statute 16 Charles II, sec. 8, and that is, where a defendant there brings error, he may be bound to the plaintiff in such reasonable sum as the court shall think proper, which sum has been settled at double the amount of one year's rent. 4 Burrows, 2502. The courts in England will also oblige a defendant in ejectment, who brings error, to enter into a rule or undertaking not to commit waste or destruction pending the writ. 3 Burrows, 1823; Palmer's Practice in the House of Lords, 159. The motion to enlarge the security in this case is overruled.

GAY v. PARPART.

(11 Otto, 391, 392. 1879.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—These motions are founded on an alleged defect in the form of the condition of the bond. By sec. 1000, Rev. Stat., the security to be taken on a writ of error or an appeal, where the writ or the appeal is a *supersedeas* and stays execution, must be "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fails to make his plea good, shall answer all damages and costs."

§ 1381. *What necessary to constitute a sufficient appeal bond.*

The condition of the bond in this case is, that the appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said supreme court." The object of the statutory requirement undoubtedly is to secure to the opposite party his damages and costs, in case the judgment or decree shall not be reversed, and that, we think, is the legal effect of this bond. If, on the final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed, and the writ of error or appeal has not been prosecuted with effect. In our opinion the language of the bond covers fully all the requirements of the statute. The motions to dismiss the appeal and vacate the *supersedeas* are, therefore, overruled.

The appellee has coupled with a motion to dismiss, a motion, under rule 6, to affirm, because it is manifest that the appeal was taken for delay only. Clearly this is not a case for the application of that rule.

Motions denied.

O'REILLY *v.* EDRINGTON.

(6 Otto, 724-727. 1877.)

APPEAL from U. S. Circuit Court, Southern District of Mississippi.

§ 1382. *The security for an appeal must be taken by the judge or justice. (a)*
Opinion by WAITE, C. J.

None of the objections to this appeal are, in our opinion, well taken, except the one which relates to the approval of the bond. That, we think, must be sustained. The security required upon writs of error and appeals must be taken by the judge or justice. Rev. Stat., sec. 1000. He cannot delegate this power to the clerk. Here the approval of the bond was by the clerk alone. The judge has never acted; but, as the omission was undoubtedly caused by the order of the court permitting the clerk to take the bond, the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals and writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings. *Martin v. Hunter's Lessee*, 1 Wheat., 361; *Dayton v. Lash*, 94 U. S., 112.

If the appellant desires that the appeal shall operate as a *supersedeas*, the bond may be in the sum of \$7,000; otherwise, in the sum of \$250. The security may be approved by any judge or justice authorized to sign a citation upon an appeal in the cause; but this cause will stand dismissed unless the appellant shall, on or before the first Monday in March next, file with the clerk of this court a bond, with good and sufficient security, conditioned according to law, for the purposes of the appeal; and it is so ordered.

ANSON *v.* BLUE RIDGE RAILROAD COMPANY.

(23 Howard, 1, 2. 1859.)

APPEAL from U. S. Circuit Court, Northern District of Georgia.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a motion to dismiss the appeal on the part of the appellee, upon the ground that no appeal bond was given at the time of granting the appeal, as required by the statute, either as a security for costs or *supersedeas* of execution. 1 Stats. at Large, pp. 84, 85, secs. 22, 23, p. 404.

§ 1383. *Where no appeal bond was given, the supreme court will allow one to be filed. (b)*

It is admitted that no bond was given, but the counsel resisting the motion proposes to give one for the costs, and thus prevent the dismissal, if consistent with the practice of the court. The practice has been allowed in several cases, as will be seen by reference to 10 Wheat., 311; 16 How., 148, and 9 Wheat., 555. In the last case, time was granted within which to give the bond, or the case be dismissed. The bond may be taken and approved before any judge or justice authorized to allow the appeal or writ of error.

Let the appellant have sixty days to give the bond and file it with the clerk, upon complying with which order the motion be dismissed; otherwise, granted.

(a) Approved in *National Bank v. Omaha*, 6 Otto, 737.

(b) In *Boyd v. Grundy*,* 6 Pet., 777, the record showing that no appeal bond was given, the appeal was dismissed.

KEYSER *v.* FARR.

(15 Otto, 265-267. 1881.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The decree in this case was rendered on the 26th of October, 1881. The record also shows that the court on the same day entered an order allowing an appeal and fixed the amount of the bond. On the 29th and 31st of October bonds for the appeal and *supersedeas* were executed by all the several appellants, and approved by the chief justice of the court. On the last day named the case was docketed in this court, and a transcript of the record filed. Afterwards, on the 14th of November, but during the term at which the order allowing the appeal was entered, the appellees moved the court below to require additional security from the appellants, Keyser, Howard and Smith. On the hearing of this motion the court entered an order purporting to set aside and vacate the former allowance of an appeal, but at the same time made a new allowance to take effect on that day. Upon this state of facts, the appellants, fearing that execution may issue notwithstanding their appeal docketed here, move for an order restraining the court below from proceeding to enforce the decree, and the appellees move to dismiss: 1, because the allowance of the appeal has been vacated; and 2, because the value of the matter in dispute is less than \$2,500.

§ 1384. *After a bond is accepted, and the case is docketed in the supreme court, the jurisdiction of the lower court ceases.*

After the acceptance of the bonds for the appeal and the docketing of the cause in this court, the jurisdiction of the court below was gone. From that time the suit was cognizable only in this court. In *Goddard v. Ordway*, 101 U. S., 745, there was nothing more than the formal order of allowance entered, as in this case, with the final decree. Such an order, while in that condition, it was held, was subject to the control which every court retains over its ordinary judgments during the term. In *Draper v. Davis*, 102 U. S., 370, however, it was decided that after a bond had been accepted by one of the judges in accordance with such an order of allowance, the jurisdiction was transferred from the court below. Here a bond was not only accepted, but the case was actually entered in this court. In this way clearly the court below was deprived of power to make its order of November 14th. It follows that the motion to dismiss, so far as it is based upon the order of the court below vacating its allowance of the appeal, must be denied, and that the *supersedeas* which followed in law from the acceptance of the bond by the chief justice is in force. Such was our ruling in *Draper v. Davis*, *supra*, on a similar motion at the last term.

The questions presented by the other branch of the motion to dismiss are important, and have not been directly settled, as we think, by any decision yet made by this court. Their further consideration is postponed until the case is heard on its merits.

§ 1385. *In general.*—Cause dismissed because the bond is given to a person who is not a party. *Davenport v. Fletcher*, 16 How., 142.

§ 1386. An appeal bond need not be signed by all the defendants. It is sufficient if the bond is approved by the court, as satisfactory and complete security, by whomsoever it may be executed. *Brockett v. Brockett*, 2 How., 238. See the case, §§ 1513-16.

§ 1387. The objection that, although an appeal was claimed by all the defendants, the bond was given by one, should be taken by a preliminary motion to dismiss the appeal; but it be-

comes immaterial when, after hearing, it is found that the decree must be reversed as to the one giving the bond. *Mandeville v. Riggs*, 2 Pet., 490.

§ 1388. An appeal bond in the alternative—to the people of the state of New York, or to B., the relator—is good, and may be sued upon in the name of either. *Spalding v. New York*,* 2 How., 66.

§ 1389. A bond that does not clearly and accurately state by what court the decree appealed from was rendered is not sufficient, and will not be approved. *Benjamin v. Hart*,* 4 Ben., 454.

§ 1390. Where an appeal bond did not set out the nature of the cause of action, nor the court to which the appeal was prayed, it was held that as its object appeared to be legal, and it appeared to be sufficiently certain to prevent a second recovery, it should be held valid. *Smith v. Walker*,* Hemp., 289.

§ 1391. Although the statute may require a recognizance for an appeal, an appeal bond will be good, and the sureties will be liable thereon. *Dowlin v. Standifer*,* Hemp., 290; *Deen v. Hemphill*,* Hemp., 154.

§ 1392. **Duty of judge.**—A writ of error will not be dismissed on the ground that the judge signing the citation did not approve the bond for security, when it appears that he attested the signatures of the sureties as a witness. The approval is not required to be in writing, and will be presumed from the signing of the citation and the authentication of the signatures of the sureties. *Davidson v. Lanier*, 4 Wall., 453. See § 1374.

§ 1393. From the fact that the sureties on a bond for the prosecution of a writ of error were sworn as to their sufficiency by the judge of the state court who signed the citation, it may be inferred that the security was taken by him according to law. *Silver v. Ladd*,* 6 Wall., 440.

§ 1394. An objection was made that it did not appear that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the twenty-second section of the judiciary act. *Held*, that the provision is directory to the judge, and that an omission does not vitiate the writ of error; that if any party be prejudiced by the omission, the supreme court can grant him summary relief by imposing such terms on the other party as, under all the circumstances, may be legal and proper; that where there is nothing in the record to show whether a bond was taken or not, the supreme court will presume that the law was complied with. *Martin v. Hunter*, 1 Wheat., 304. See the case, §§ 682-729.

§ 1395. **Amount of penalty.**—It is not required that the security in an appeal bond shall be in any fixed proportion to the decree. What is necessary is that it be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be given within ten days from the rendering of the decree. The question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable in the supreme court. It is, therefore, matter of discretion with the supreme court to increase or diminish the amount of the bond, and to require additional sureties or otherwise as justice may require. *Rubber Co. v. Goodyear*, 6 Wall., 156. See the case, §§ 1307-8.

§ 1396. On appeal from the circuit to the supreme court in a suit to foreclose a railroad mortgage, the amount of the bond on appeal will be proportioned to the injury to the appellants by the delay. *Duncan v. Mobile & Ohio R'y Co.*, 3 Woods, 600.

§ 1397. The security which a judge should require upon signing the citation on a writ of error from the supreme court to the district court should be for the costs and such damages for delay as shall be adjudged by the appellate court upon affirmance of the judgment below. *Renner v. Bank of Columbia*, 2 Cr. C. C., 310.

§ 1398. Upon a decree of foreclosure of a railroad mortgage, the bond on appeal to the supreme court was fixed by considering that the road would not sell for more than was due at the date of the decree, and that during the probable time of the pending of the appeal the interest which would accrue on bonds would amount to a little more than \$798,000, and the amount was accordingly fixed at \$800,000. *Wilmer v. Atlanta & Richmond R'y Co.*, 2 Woods, 457.

§ 1399. It seems that where an appeal to the supreme court would tie up a fund pending the appeal, the security required would have to be enough to cover the interest during the time the suit might be pending on appeal, besides the costs and other incidental expenses and damage. *Turner v. L. B. & W. R'y Co.*, 8 Biss., 533.

§ 1400. Where nothing appears in the record to show that the indemnity in an appeal bond is insufficient, it will be presumed to be sufficient. Where the judgment or decree is for the recovery of money, not otherwise secured, the indemnity must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal. But in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, indemnity is only required in an

amount sufficient to secure the sum recovered for the use or detention of the property and the other incidental items, as in cases where the judgment or decree is for money. What is necessary is that it be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be filed within ten days from the rendering of the decree; and the question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal that question as well as every other in the cause becomes cognizable in the supreme court. It is, therefore, matter of discretion with the court to increase or diminish the amount of the bond and to require additional sureties or otherwise as justice may require. *French v. Shoemaker*,* 12 Wall., 86. See § 1372.

§ 1401. **Time of filing.**—In this case a motion was made to dismiss the appeal because the bond was not filed in time. The decree was drawn up and placed in the clerk's hands on the 15th of the month, to be approved by the court, and entered as of that day. It was entered on the 20th as of the 15th, and the bond was filed on the 28th. The court ruled as follows: "We think that for the purposes of appeal this decree must be regarded as having been passed on the 20th, and that the bond was filed in time. But if this were otherwise, and through mistake or accident no bond, or a defective bond, had been filed, this court would not dismiss the appeal, except on failure to comply with an order to give the proper security within such reasonable time as it might prescribe." *Seymour v. Freer*,* 5 Wall., 822. See § 1375.

§ 1402. If the district court, allowing an appeal to the supreme court, accept an appeal bond after the expiration of the time limited within which the appeal might be taken, such bond must be held to relate back to the time of the allowance of the appeal, and the supreme court will presume that the security was given according to the rule prescribed by the district court. *The Dos Hermanos*, 10 Wheat., 311.

§ 1403. The supreme court permitted an appeal bond to be filed *nunc pro tunc*, holding it probable that the peculiar state of the record, and mode of bringing up the questions from the court below, had misled the solicitors. *Brobst v. Brobst*,* 2 Wall., 96.

§ 1404. **Sureties, justifying.**—It was objected to a writ of error bond, that the sureties did not justify in pursuance of a notice by the plaintiff's attorneys requiring them to do so. *Held*, that as the usual affidavit of the ability of the sureties accompanied the bond at the time of its approval, and as there was no allegation of their inability, a further justification was not required. *Hatch v. Coddington*,* 5 Blatch., 523.

§ 1405. Where a surety on an appeal bond is not present, his affidavit as to his responsibility is not sufficient; the evidence of some reliable person is necessary. *Hobson v. Johnson*,* 4 Biss., 505.

§ 1406. **New bond.**—On an appeal from a justice of the peace, the circuit court quashed the appeal bond, but permitted a new bond to be filed. *Held*, that the refusal of the court to dismiss the appeal after quashing the bond was proper; that the practice was sanctioned by the practice of several of the states. (*Brown v. Mathews*, 1 Rand., 462; 1 Munf., 397, cited.) *Deen v. Hemphill*,* Hemp., 154.

§ 1407. Where a writ of error bond becomes insufficient by reason of facts arising subsequent to its approval, the supreme court may order a new bond. But upon facts existing at the time the security was accepted, the action of the justice, within the statute and the rules of practice adopted for his guidance, is final. (*Jerome v. McCarter*, 21 Wall., 17, affirmed.) *Martin v. Powder Co.*,* 3 Otto, 302.

§ 1408. **Increasing amount.**—It seems that after the allowance of a writ of error from the supreme court to the supreme court of a state, a judge at chambers has no power to increase the bond required on the granting of the writ. *Slaughter House Cases*, 3 Chic. L. N., 41. See § 1376.

§ 1409. A writ of error to the supreme court of a state was allowed by one of the justices of the supreme court, and the amount of the bond required was fixed at the sum required on appeal from the state district to the state supreme court. A motion was made to increase the amount of the bond, because the plaintiff in error would be entitled during the pendency of the writ of error to fees largely in excess of the amount of the bond; the motion was overruled on the ground that there was no statutory warrant for requiring a bond to protect such contingent emoluments. *Ibid*.

§ 1410. **Condition broken, when.**—The condition of an appeal bond from a justice's court to the circuit court is not broken unless the judgment of the justice is affirmed *in toto*. *Butt v. Stinger*, 4 Cr. C. C., 253.

§ 1411. **An executrix** has a right to appeal from a sentence of the orphans' court without giving security to prosecute the appeal with effect. *Deneale v. Young*, 2 Cr. C. C., 200.

§ 1412. **Waiver by appearance.**—One of the parties to an action before a justice of the peace having appealed, the circuit court thereby acquired jurisdiction. The appearance of the appellee before the appellate court, without objection on his part for the want of an appeal

bond, is a waiver thereof, and the absence of such appeal bond in no way affects the jurisdiction of the court. *Dillingham v. Skein*, Hemp., 183.

§ 1413. **Action on.**—Debt is the proper action on a bail bond or recognizance. When the principal and sureties all enter into the recognizance, or into the bond, the action must be brought against all, if living, or against each separately. If brought against two without joining the rest, the defendants may plead it in abatement. *Dowlin v. Standifer*,* Hemp., 290.

§ 1414. A state law in force when an appeal bond was given in an action in the state court is the law of the contract, and governs an action on the bond, even though subsequently repealed. *Goshorn v. Alexander*, 2 Bond, 163.

§ 1415. Where an appeal bond is executed to three jointly, the obligees may join in a suit on the appeal bond. *Arnold v. Frost*,* 9 Ben., 267.

§ 1416. Where a court has jurisdiction of the original matter, it has jurisdiction of a suit on the appeal bond. *Arnold v. Frost*,* 9 Ben., 267.

§ 1417. Although no appeal lies from the judgment of a justice of the peace of the District of Columbia to the circuit court in cases where the trial was by jury, yet when the defendant does in fact appeal, and gives an appeal bond, an action is maintainable on the bond. *Chase v. Smith*, 4 Cr. C. C., 90.

§ 1418. In an action on an appeal bond, given on writ of error from the supreme to the district court, the breach of the bond assigned must be single, and each alternative of the bond denied; the plaintiff in error is not bound absolutely on such bond to pay the damages adjudged to the defendant in error in the supreme court, but only to indemnify him for whatever losses he may have sustained by the judgment's not being satisfied after affirmance. *Tucker v. Lee*, 3 Cr. C. C., 685.

§ 1419. A sum of money deposited in the consular court of Shanghai, China, and received without objection, is a sufficient security on appeal to the circuit court for the district of California. *The Ping-On v. Blethen*, 11 Fed. R., 611. See § 1283.

2. Liability of Sureties.

SUMMARY—*Apportioning sum collected*, §§ 1420, 1422.—*Liable for interest*, § 1421.—*Affirmance in circuit court fixes liability of sureties*, § 1423.—*Execution not necessary before bringing suit*, § 1424.—*On summary process*, § 1425.—*Sale of creditor's interest in judgment*, § 1426.

§ 1420. A sum realized on execution, or paid by the principal, less than the original judgment, cannot be apportioned so as to reduce the damages for which a surety on the appeal bond is liable. *Ives v. The Merchants' Bank*, §§ 1427, 1428.

§ 1421. A surety on a penal appeal bond is liable for interest from the time of bringing suit on the bond. *Ibid.*

§ 1422. A decree was entered for a certain sum, and an order was made for a sale of a tract of land, the proceeds to be applied in payment of the decree. *Held*, that the sureties on the appeal bond were not entitled to have the proceeds of the sale applied, *pro rata*, to the satisfaction of the decree and the judgment against them on the bond. *Sessions v. Pintard*, § 1429.

§ 1423. Where a case is taken from the district to the circuit court on writ of error, an affirmance of the judgment fixes the liability of the sureties on the *supersedeas* bond, and they are not discharged by the execution of a new *supersedeas* bond and the removal of the case to the supreme court; especially where the judgment is affirmed in the supreme court. But the sureties on the first bond are not liable for the costs of the proceedings subsequent to the affirmance in the circuit court. *Babbitt v. Finn*, §§ 1430-1432.

§ 1424. It is not necessary to issue execution on the judgment before bringing an action on the writ of error bond. *Ibid.*

§ 1425. Under the laws of Louisiana sureties on an appeal bond are liable to judgment on summary process, on return of *nulla bona* against the principal, and in such proceeding they cannot question the return of the marshal, nor compel him to amend it. *Smith v. Gaines*, §§ 1433-1435.

§ 1426. Sureties on an appeal bond remain liable after the creditor's interest in the judgment has been attached and sold. *Ibid.*

[NOTES.— See §§ 1436-1444.]

IVES *v.* THE MERCHANTS' BANK OF BOSTON.

(12 Howard, 159-165. 1851.)

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—At November term, 1843, in the circuit court of Rhode Island, the Merchants' Bank of Boston recovered against the New Jersey Steam Navigation Company, by decree in an admiralty suit, the sum of \$22,224 and costs of suit. From which decree the respondents appealed to this court; and on December 14, 1843, Moses B. Ives, the present plaintiff in error, became bound as surety for the appellants in a penal bond of \$2,500, with a condition "that the said navigation company should prosecute their appeal with effect and should well and truly pay all such costs and damages as should be adjudged for them to pay by said supreme court or by said circuit court by reason of said appeal in case of failure. At December term, 1847, the appeal was heard before the supreme court and the decree affirmed with costs and six per cent. damages. On return of the mandate a judgment was entered in the circuit court against the navigation company for the original amount; and also for \$6,078.20 damages arising by reason of the appeal, and for \$529.98, being costs covered by the appeal bond. The entire sum for principal, damages and costs being \$28,452.78. Execution issued for the aggregate sum, and the steamboat Massachusetts was sold, 20th July, 1848, for \$25,000, by virtue of the writ. The vessel had been attached when the proceeding was commenced and continued subject to a lien until sold; but, not bringing a sum equal to the final decree, Ives was sued on his appeal bond, and the circuit court gave judgment against him for the amount of the penalty and also for six per cent. interest on the \$2,500 from October 10, 1848, being the time when he was served with the writ; the penalty and interest amounting to \$2,605.80, for which judgment was rendered at the June term, 1849. To bring up this judgment Ives sued out the present writ of error.

§ 1427. *A sum realized on execution, less than the final judgment, cannot be apportioned so as to reduce the damages for which a surety on an appeal bond is liable.*

First, it is insisted and assigned for error, that the \$25,000 made by a sale of the vessel covered about eighty per cent. of the amount included in the execution, and ought to have been proportioned to every part of the demand, and if thus applied to damages and costs would have reduced them to about \$1,200, and that plaintiff in error was responsible for no more. Ives was bound to pay such damages as might be awarded by the supreme court and costs; and could have been sued and a judgment had against him had no execution issued. He was positively bound to the amount of his bond, and could not be heard to allege an extinguishment of it in part, because of a payment made by his principals, leaving an amount due equal to the bond. This is the plain equity of the case. If the appeal had not been taken, and the property attached had been sold in due time after the first decree for \$25,000, no damages would have been sustained by the plaintiffs below, and as the surety was instrumental in delaying satisfaction, it is equitable that he should respond to such damage as his act occasioned, and which enlarged the amount. The second ground relied upon to reverse is, that, by uniform practice, costs are deducted from the first proceeds collected on an execution including them; and that a surety for costs is never held liable when an amount sufficient to cover costs is made of the principal. It is not necessary at present to decide this matter of practice, nor

shall we do so, as the unsatisfied damages, exclusive of costs, far exceeded the judgment rendered by the circuit court.

§ 1428. *A surety on an appeal bond is liable for interest from the time of commencing suit on the bond.*

The third and remaining question is one of general importance and some difficulty. The surety was bound in a penal bond, and this penalty the circuit court exceeded by allowing interest on it from the time of demand by suit; and it is insisted that in this there was error. The action was debt, with an allegation of damages sustained by its detention. The parties came to a hearing on an agreed case, which set forth the facts and submitted the law arising on them to the court; and, as the twenty-sixth section of the judiciary act of 1789 only gives the courts power to assess damages and to render judgment for so much as is due according to equity in cases of default or confession, or on demurrer, it does not apply in cases heard on agreed facts or tried upon pleadings and proofs. This court so held in *Farrar and Brown v. The United States*, 5 Pet., 385, and which construction we follow. In the same cause it was adjudged that in an action of debt against the sureties of a surveyor who had received moneys of the United States to disburse and given bond with sureties to account for them, the practice was to render judgment in debt for the penalty to be discharged by the amount actually due, and that this amount could not exceed the penalty. In cases where unascertained damages are claimed, about which there is a contest, the foregoing is the proper rule; although it was departed from in the case of *M'Gill v. The Bank of The United States*, 12 Wheat., 514, where payments had been made by the sureties after a defalcation, and an account was taken between the parties and interest calculated on both sides and a balance struck, which, when added to previous payments, exceeded the penalty of the bond. But these cases widely differ from the present. Here the surety was bound to pay damages that might be adjudged against his principal in the supreme court. They were established and settled at \$6,078.26; and this judgment bore six per cent. interest from its date. It was conclusive as against the principal; and equally conclusive of the fact that the surety was bound to pay it to the extent of \$2,500. Then this amount was due by the bond which could have been at once enforced by suit; and if the supreme court had been vested with power to render judgment against the surety on the appeal bond, as is the case in some of the states, no reason would seem to exist why the bond should not bear interest from the date of judgment in the supreme court against the surety as well as against the principal. But as Ives only guarantied the payment of damages, and it was a duty imposed on the principal to pay the entire judgment, the moderate rule has been applied of requiring interest from the time that demand of payment was made by suit; a rule now so generally established in similar cases by state courts of high authority, that this court could not violate it without manifest impropriety. Of course, we are dealing with an appeal bond and do not intend to go beyond the case before us. It is, therefore, ordered that the judgment rendered by the circuit court be affirmed.

SESSIONS v. PINTARD.

(18 Howard, 106-109. 1855.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS. — This is an appeal from the circuit court of the eastern district of Arkansas.

Pintard, on the 10th of April, 1847, obtained a decree against Archibald Goodloe for \$10,552, with ten per cent. interest per annum on the amount decreed. There was also an order that a certain tract of land should be sold and the proceeds applied to the payment of the decree. An appeal was taken from this decree to this court, by which the decree was affirmed. On the 20th of February, 1852, Pintard commenced an action against Sessions and others on the appeal bond, and at April term, 1853, obtained a judgment on the bond for the penalty thereof, amounting to the sum of \$12,000. At the same time Pintard procured an order for the sale of the land specified in the decree, which was sold on the 15th of November, 1852, for the sum of \$8,025, which, after paying the expense of the sale, left a balance of \$7,525 as a credit on said decree, as of the 15th of November, 1852. The interest, with the sum decreed, up to that period amounted to \$16,877. The proceeds of the sale of the land being deducted from this sum, leaves a balance on the decree of \$8,912, with interest from the 17th day of April, 1853. The interest on this sum, up to the time judgment was rendered on the appeal bond, makes the sum of \$9,283, as the amount to be collected on the judgment. An execution was issued on the judgment the 14th of May, 1853, for \$12,000, with an indorsement of a credit of \$2,717. This execution was levied on a number of slaves, of the value of \$12,000, as the property of Sessions, the defendant. A delivery bond was taken for the slaves, with Daniel H. Sessions as security; but the slaves not being delivered on the day of the sale, an execution was issued against principal and surety on the delivery bond. At this stage of the proceedings a bill was filed by the appellants, complaining that the distribution which had been made of the proceeds of the sale of the land was inequitable, and that such proceeds should be credited on the judgment entered upon the appeal bond, *pro rata*, and not exclusively on the decree; and the complainants pray that Pintard may be decreed to enter a credit upon the judgment as aforesaid, as of its date, for the sum of \$5,323.35; and that a perpetual injunction might be granted to prevent him from collecting any more than the residue of the judgment, after deducting the above sum. A temporary injunction was granted, Pintard filed his answer, and upon the final hearing the injunction was dissolved and the bill dismissed at the costs of the complainants. From this decree an appeal was taken, and that brings the case before us. The complainants in their bill allege no fraud nor mistake as a ground of relief. They claim that the money received under the decree for the sale of the land shall be applied, *pro rata*, in the discharge of the judgment against them, and the balance of the decree which remains after deducting the judgment. This would give to them a credit on the judgment of \$5,724; and that Pintard, in claiming the whole amount of the judgment, seeks to recover from them \$3,568.99 more than in equity he is entitled to.

§ 1429. *Sureties on an appeal bond are not entitled to have the proceeds of a sale of land applied in part to the discharge of their liability on the bond.*

This claim of the appellants rests upon the ground that there was a lien on the land sold by the original decree, which operated as an inducement to them

to become sureties on the appeal bond. The land, by the original decree, was directed to be sold; consequently the proceeds of the sale could be applied only in discharge of the decree. On what ground could the appellants claim a *pro rata* distribution of this fund? They were bound to the extent of the penalty of their bond, on which a judgment was entered. They had a direct interest in the application of the proceeds of the land to the payment of the original decree, including the interest and costs; and so much as such payment reduced the original decree below the amount of the judgment against them, they were entitled to a credit on the judgment. The judgment has been so made, and the credit entered, and beyond this they have no claim, either equitable or legal. In the argument, a subrogation of the land or its proceeds, for the benefit of complainants, is urged; but on what known principle of equity does not satisfactorily appear. Had the appellants paid the decree in full, they might have claimed a control over the land decreed to be sold, or its proceeds. They made no payment, but assert a general equity to have the fund applied, *pro rata*, on their judgment. This would leave a large amount of the original decree unsatisfied. On what ground could Pintard be subjected to such a loss? He looked to the land and the surety on the appeal bond, which more than covered his decree, including interest and cost. The condition of the appeal bond was "for the prosecution of said appeal to effect, and to answer all damages and costs, if" there should be a failure to make the plea good in the supreme court. There was a failure to do this, and the penalty of the bond was incurred. Whatever hardship may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree, the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed *pro rata* between them. Pintard has a claim on both funds; first, on the proceeds of the land, and second, on the judgment entered on the appeal bond for the satisfaction of the original decree.

The decree of the court is affirmed, with costs.

BABBITT *v.* FINN.

(11 Otto, 7-16. 1879.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Notice to the opposite party is required in every case when a writ of error is sued out or an appeal is taken to remove a cause into an appellate court, except when the appeal is allowed in open court; and the provision is that every justice or judge signing the citation, except in certain cases not material to mention, shall take good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect; and if he fail to make his plea good, that he shall answer all damages and costs where the writ is a *supersedeas*, or all costs only where it does not supersede the execution. Rev. Stat., sec. 1000.

It appears that the plaintiff as an assignee in bankruptcy recovered judgment in the district court against Edward Burgess in the sum of \$4,236.28 debt, and costs of suit. Exceptions were filed by the defendant, and he sued out a writ of error and removed the cause into the circuit court for the same district to reverse the judgment. Sureties to the bond were required to per-

fect the removal of the cause, and the defendants in the present suit signed the bond as sureties of the principal, who is the party that sued out the writ of error. Sufficient appears to show that the bond was duly approved and the writ allowed, and that the cause was removed into the circuit court for trial. Due notice was given to the plaintiff, and it appears that the parties were there heard and that the circuit court affirmed the judgment of the district court, with costs. Payment of the judgment having been refused, and it appearing that the debtor had no property wherewith to satisfy the execution, the judgment creditor, as plaintiff, instituted the present suit against the defendants as the sureties of the principal, counting on the said bond as the cause of action.

None of these facts are controverted, and it appears that the plaintiff in his declaration assigned as a breach of the bond that the principal in the same did not prosecute his writ of error to effect nor answer all or any damages or costs on failing to make his plea good. Service was made; and certain proceedings followed that it is not important to notice, subsequent to which the defendants filed an answer in which they set up the defense that the defendant in that suit by writ of error removed the judgment of the circuit court into the supreme court, and gave a new *supersedeas* bond, with good and sufficient sureties, to prosecute the appeal to the last-named court to effect; and the defendants here aver that by force and effect of said last-named writ of error and bond the judgment of the circuit court was superseded, rendered inoperative, and vacated, and that the defendants in that bond thereby became released and discharged from any and all liability on the bond which they signed as sureties for their principal, it appearing that the sureties on the last-named bond are solvent, and that the bond is sufficient in amount to answer all damages and costs. Responsive to those affirmative defenses the plaintiff filed a demurrer to the affirmative defenses set up in the answer, which was overruled by the court. Failing in that, the plaintiff filed a replication denying the new matters set up in the answer, and the court, on motion of the defendants, rendered judgment in their favor. Exceptions were filed by the plaintiff, and he sued out the present writ of error.

Three errors are assigned in this court: 1. That the circuit court erred in overruling the plaintiff's demurrer to the affirmative defenses set up in the answer. 2. That the court erred in rendering judgment for the defendants. 3. That the court erred in not rendering judgment for the plaintiff. Argument to show that the bond given in the district court to prosecute the appeal to effect and answer all damages and costs was sufficient in form is unnecessary, as nothing is suggested to the contrary; nor is it necessary to enter into any discussion to prove that the omission of the names of the sureties in the introductory part of the bond does not affect its validity, inasmuch as it appears that each signed and sealed the instrument. *Pequawkett Bridge v. Mathes*, 7 N. H., 230; *Martin v. Dorte*, 1 Stew. (Ala.), 479; *Johnson & Cain v. Steamboat Lehigh*, 13 Mo., 539; *Brandt, Sureties*, sec. 15; *Cooke v. Crawford*, 1 Tex., 9.

§ 1430. *Affirmance of judgment in the appellate court fixes the liability of the sureties.*

Judgment was affirmed in the circuit court, and the rule is universal that the affirmance of the judgment in the appellate court fixes the liability of the sureties, as it shows conclusively that the principal obligor did not prosecute his appeal to effect. *Karthaus v. Owings*, 6 Har. & Johns. (Md.), 134, 139. Where the bond is given in a subordinate court to prosecute an appeal to effect in a

superior court, the sureties become liable if the judgment is affirmed in the superior court, nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination, and a new bond is given to prosecute the second appeal if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error. *Dolby v. Jones*, 2 Dev. (N. C. L.), 109; *Ashby v. Sharp*, 1 Litt. (Ky.), 156; *Robinson v. Plimpton*, 25 N. Y., 484; *Smith v. Falconer*, 11 Hun (N. Y.), 481; *Gardner v. Barney*, 24 How. Pr. (N. Y.), 467-469; *Smith v. Crouse*, 24 Barb. (N. Y.), 433.

§ 1431. — *but they are not liable for the costs of an appeal to a higher court.*

Sureties in a bond for an appeal from the special term to the general term are fixed in their liability when the judgment rendered in the special term is affirmed at the general term, but such sureties are not liable for costs in the appeal from the general term to the court of appeals, as the costs of such an appeal are not within the undertaking of the sureties in a bond given to prosecute the appeal from the special term to the general term, from which it follows that the sureties in the bond to prosecute the appeal from the general term to the court of appeals are alone responsible for such costs without any claim for contribution from the sureties in the bond given to prosecute the appeal from the court of original jurisdiction to the general term. *Hinckley v. Kreitz*, 58 N. Y., 583, 587. Viewed in the light of these suggestions, it is clear that the sureties in the bond given to prosecute the removal of the cause in this case from the district court to the circuit court became fixed when the judgment rendered in the district court was affirmed, nor did the removal of the judgment of affirmance rendered in the circuit court into the supreme court have any effect whatever to diminish the liability of those sureties. Certainly not, as the judgment rendered in the circuit court was affirmed in the supreme court. Judgment having been rendered against the principal in the bond in the district court, and the condition of the bond being that he, the principal, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, it is difficult to see how it can be held that the sureties are discharged when it is held both in the circuit court and the supreme court that the judgment of the district court is correct and that the judgment should be affirmed. Neither principle nor authority will support that theory, nor do they afford it any countenance whatever. *Jordan v. Agawam Woollen Co.*, 106 Mass., 571.

§ 1432. *It is not necessary for a plaintiff to issue execution against a principal before bringing suit on the appeal bond. (a)*

Suppose that is so, still it is contended by the defendants that they are not liable in a suit on the bond because the plaintiff did not, as a preliminary proceeding, sue out an execution on the judgment and take proper steps to make the money. Without more, the condition of the bond is a sufficient answer to that defense, as it stipulates that if he, the principal, fails to make his plea good, the obligors, principal and sureties, shall answer all damages and costs, which is quite enough to show that it was not necessary that an execution should be sued out on the judgment before a right of action would accrue to the judgment creditors to enforce their remedy on the bond. As between the obligors and obligees all the obligors are principal debtors, though as between

(a) See *Smith v. Gaines*, 3 Otto, 341, *infra*.

each other they may have the rights and remedies resulting from the relation of principal and surety. It was the affirmance of the judgment that fixed the liability, and inasmuch as the defendants bound themselves that the principal should pay the judgment if he failed to make his plea good, no such preliminary step is required. *Gillette v. Bullard*, 20 Wall., 571, 575; *Tisser v. Darling*, 9 Cal., 278, 281; *Smith v. Ramsay*, 6 Serg. & R. (Pa.), 573; *Brandt on Sureties*, sec. 404. It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the appellate court should be issued against the principal. When they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties *proprio vigore* become liable to the same extent as the principal obligor. Unless the bond contains some special provisions to that effect, the sureties in such a bond given in a common law action do not become liable for the costs incurred in consequence of a new appeal to a still higher court; or, in other words, the sureties in a bond given in the district court to indemnify the opposite party on an appeal to the circuit court are not liable for the costs incurred by a subsequent removal of the cause from the circuit court to the supreme court, the rule being that in that court the plaintiff in error or appellant must give a new bond; but it is equally well settled that such new appeal will not diminish or discharge the liability of his sureties on the bond given in the district court, unless the judgment rendered in the district court is wholly reversed. Apply these suggestions to the case before the court and it is clear that the circuit court gave judgment for the wrong party.

The judgment will be reversed and the cause remanded with directions to sustain the demurrer of the plaintiff to the affirmative defenses set up in the answer, and to render judgment in favor of the plaintiff, in conformity with this opinion. So ordered.

SMITH v. GAINES.

(3 Otto, 341-344. 1876.)

ERROR to U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—Mrs. Gaines, the defendant in error, having recovered a decree against the city of New Orleans for the sum of \$125,266.79 in the circuit court of the United States for the district of Louisiana, the city took an appeal to this court; and, for the purpose of superseding the execution of the decree, the plaintiffs in error gave the bond which is the foundation of the present suit. The decree was affirmed; and, on return of the mandate, an execution was issued against the city for the amount of the decree and costs, which was placed in the hands of the marshal. That officer made return on this execution that he had not been able to find any property of the city subject to the writ, and that though he had called on the proper officers of the city, and on the counsel of Mrs. Gaines, neither of them had pointed out to him such property. On this return the counsel of Mrs. Gaines, pursuing the practice prescribed by the laws of Louisiana in such cases, procured from the circuit court a rule on the sureties in the *supersedeas* bond, to show cause why judgment should not be entered against them on their undertaking, and execu-

tion issue thereon for the amount of the decree and all necessary costs. To this rule the defendants set up two answers, to wit: 1. That the return of the marshal was false, and that there was property of the city liable to the execution which had been shown the marshal, sufficient to pay the same. 2. That, by proceedings of certain creditors of Mrs. Gaines, in the state courts of Louisiana, by way of garnishee and otherwise, the judgment had been sold and was held by the parties, and her right to the money due from the city seized and held for the benefit of those creditors.

In aid of the first defense, and while the case was pending, the sureties obtained a rule on the marshal to show cause why he should not amend his return in the matter in which they alleged it to be false. To this rule the marshal answered that the return was made on his official responsibility; that the same was true and sufficient, and he did not desire to change it. This rule came on to be heard with the rule for judgment against the sureties, and the court dismissed it. On this hearing the sureties offered evidence tending to show that there was property liable to execution belonging to the city, which evidence was rejected, and an exception was taken to the ruling of the court. This evidence was offered on both issues; namely, that regarding the amendment of the marshal's return, and that regarding the liability of the sureties on the bond. This ruling of the court is the first error assigned here.

§ 1433. *In Louisiana sureties in an appeal bond are liable to judgment on a summary proceeding after a return of nulla bona as to their principals. (a)*

We are of opinion that the action of the court was correct. At common law, the sureties on the bond would be liable to a suit without issuing an execution against the principal. The fact that the judgment appealed from was affirmed and was unpaid would be sufficient. Their undertaking is to pay in that event, and they must do it. But the Code of Practice of Louisiana of 1870, sec. 596, says: "If, on the execution of the judgment of the appellate court, there is not sufficient property of the appellant to satisfy the judgment and costs, the appellee may obtain judgment against the surety given by the appellant; *provided*, that no suit shall be instituted against such surety until *the necessary steps* have been taken to enforce payment against the principal." How the want of sufficient property of the appellant is to be shown, and what are "the necessary steps to enforce payment against the principal," are shown by section 570 of the Revised Statutes of the same year, which is as follows: "In all cases of appeal to the supreme court, or other tribunal in this state, if the judgment appealed from be affirmed, the plaintiff may, on the return of the execution that no property has been found, obtain a decree against the surety on the appeal bond for the amount of the judgment, on motion, after ten days' notice, which motion shall be tried summarily and without the intervention of a jury." It is a fair inference from these two provisions that the issue of an execution and the return on it of the proper officer of *nulla bona* is what is required, and all that is required, to render perfect the obligation of the sureties to pay. This seems to have been the view of the Louisiana courts also, under the code formerly in existence, with similar provisions to those we have quoted. *Allen v. Hawthorne*, 1 La. Ann., 123; *Rawlings v. Barham*, 12 id., 630; *Walls v. Roach*, 10 id., 543.

(a) In *Hiriart v. Ballon*,* 9 Pet., 156, it was held that the district court of the United States, sitting in Louisiana, is authorized, by virtue of the act of May 26, 1824, to pursue the same remedy; that the surety is not entitled to a trial by jury.

§ 1434. — *nor can the sureties question the marshal's return or compel him to amend it.*

As regards the effort to compel the marshal to amend his return, we think his answer contains a reply which is conclusive. In making that return he acts under a heavy official responsibility. If false, he is liable to plaintiff and to defendant for any damages resulting from it. He must, therefore, be at liberty to make his own return, subject to that responsibility. Nor do we think his return can be questioned by the sureties. It is declared by the law to be the appropriate evidence of the right to proceed against them. It is an official act. If they had desired him to exercise it otherwise than he did, they might, by showing him property, have possibly rendered him liable for a false return, and, by paying the debt, avail themselves of this liability. But we do not think that either the spirit of the statute or the justice of the case permits an inquiry into the truth of the officer's return in the subsequent proceeding against the sureties. It is analogous to the return of *nulla bona* as the foundation of a creditor's bill in chancery, which cannot be questioned. There was, therefore, no error in rejecting this evidence and in holding the defense founded on it insufficient.

§ 1435. *Sureties are liable although the creditor's interest in the judgment may have been attached and sold.*

As to the objection that Mrs. Gaines' interest in the judgment had been attached, assigned and sold, that is nothing to these defendants. Until the judgment is paid or satisfied they are liable. Until they are garnished or enjoined, they have no defense. The equitable owners of the judgment have a right to use Mrs. Gaines' name as the judgment plaintiff to procure judgment against the sureties, and probably are pursuing this remedy. If, after judgment, when their liability is decided, or if they admit it and are ready to pay, they can easily protect themselves by a bill of interpleader, by payment into court, or by some other appropriate remedy; but while contesting their liability to anybody on the bond, they have no right to interfere among those who are claiming the benefit of the judgment,—a judgment which is not against them, and the liability to pay which they deny.

When that disputed liability is affirmed, the court will, if requested, find means to protect them from paying it more than once.

Judgment affirmed.

§ 1436. **Liability of sureties.**—It is proper for the supreme court of the territory of New Mexico, in reversing a decree of a lower territorial court, to render judgment against the sureties on the appeal bond, under the statutes of that territory. Such sureties by the act of signing the bond become voluntary parties to the suit, and subject themselves to the decree of the court. *Moore v. Huntington*, 17 Wall., 422.

§ 1437. An appeal to the supreme court was taken by a county from a decree of foreclosure of the circuit court, and a *supersedeas* bond was given. The judgment was affirmed, and the costs of the appeal were paid. In an action on the *supersedeas* bond, it was held that by the appeal no new obligation was assumed by the county in respect to the debt, and that the only damages for which the county and its sureties on the bond bound themselves to answer were such as necessarily resulted from the delay in the sale of the property, and that as no damage was shown there could be no recovery. *Supervisors v. Kennicutt*, 13 Otto, 557.

§ 1438. Where, after appeal from the judgment of a justice of the peace of the District of Columbia, the appellant dies, and no proceedings are had thereon till the third term afterwards, when it is abated and discontinued, the sureties on the appeal bond are not liable for the appellant's failure to prosecute the appeal with effect. *Jeffers v. Forrest*, 5 Cr. C. C., 674.

§ 1439. In Louisiana, where suit is brought for an instalment due on a sale of land in which the vendor's lien had been retained, and an order is made directing a sale of the land, and an appeal is taken and bond executed staying the execution, the surety is liable for the

amount of the claim sued on. And pending such appeal it is competent for another court to make an order for a sale of lands to satisfy an instalment subsequently becoming due, and the bond given in such latter proceeding is not satisfied by a payment of the first. *Marchand v. Frellsen*,* 15 Otto, 423.

§ 1440. Where an appeal bond was executed and rejected by the justice, and afterwards the name of a new surety was interlined, who then signed and sealed the bond, *held*, that this having been done without the knowledge of the original sureties, they were discharged. *Oneale v. Long*,* 4 Cr., 60.

§ 1441. Where, on an appeal in a suit *in rem* in the admiralty, the decree of the circuit court is such that no appeal can be taken to the supreme court, the sureties on the appeal bond are liable to a summary judgment, without waiting for ten days to expire after rendering the decree. *The Blanche Page*,* 17 Blatch., 221.

§ 1442. Where the condition of an appeal bond is that the obligor is to answer such damages and costs as the appellee shall sustain on failure to make the plea good, the sureties do not become liable until damages and costs have been sustained. *Bank of the Metropolis v. Swann*,* 4 Cr. C. C., 139.

§ 1443. A bond of indemnity was executed and delivered in New York, to a surety on an appeal bond in Louisiana, to save him harmless. The decree in Louisiana being affirmed, the surety was obliged to pay. Under the laws of New York, the consideration of the bond could be impeached, but not under the laws of Louisiana. In an action on the bond in the United States district court for Louisiana, it was held that the validity of the bond was not to be determined by the *lex fori*, and that as every contract is to be governed by the law with a view to which it is made, and it must be presumed that the parties had in mind a law which would uphold rather than defeat their contract, the Louisiana law must be applied. *Pritchard v. Norton*, 16 Otto, 128.

§ 1444. Under the territorial laws of New Mexico the supreme court of that territory might, in rendering judgment of affirmance, render judgment not only against the appellant but against the sureties on the appeal bond. The territorial legislature having, by the organic act, power to enact all necessary and proper laws consistent with the constitution of the United States, might enact a statute allowing such judgments to be thus entered. To sign such a bond is, in view of the statute, a consent that judgment may be thus rendered. *Beall v. New Mexico*, 16 Wall., 539.

XI. SUPERSEDEAS.

SUMMARY—*Time after overruling motion for rehearing*, §§ 1445, 1462.—*Under sec. 25 of the judiciary act*, § 1446.—*Effect of appeals and writs of error*, § 1447.—*Motion for before return day of writ*, § 1448.—*Does not extend to lower state court*, § 1449.—*Effect on injunctions*, §§ 1449, 1450.—*By justice of supreme court*, § 1451.—*Nunc pro tunc order*, § 1452.—*Time after motion to set aside a decree*, § 1453.—*Time an essential element*, § 1454.—*Final judgment*, § 1455.—*Depends on compliance with statute*, § 1456.—*Power of judge to grant a stay*, § 1457.—*The law applies to federal courts*, § 1458.—*Time of service of writ*, § 1459.—*Time computed from entry of judgment*, §§ 1460, 1461, 1466, 1468.—*On a second appeal*, § 1463.—*Power of lower court as to fund in litigation*, § 1464.—*Does not affect what has been done*, § 1465.—*Appeal in common law case; provisions of law cannot be dispensed with*, §§ 1467, 1468.—*Approval of bond procured by fraud*, § 1469.—*Power of justice of supreme court to approve bond*, § 1470.—*Non-residence of sureties within the district*, § 1471.—*Bond must secure costs*, § 1472.—*Amount of bond*, §§ 1473, 1474, 1476-1478.—*Enlarging security*, §§ 1475, 1479, 1483.—*Power of lower court after allowance of writ*, §§ 1480, 1482.—*No order necessary*, § 1481.

§ 1445. A writ of error sued out within ten days from the date of an entry refusing a rehearing operates as a *supersedeas*. *Slaughter-house Cases*, §§ 1484-1492. See § 1567.

§ 1446. Writs of error issued under the twenty-fifth section of the judiciary act have the same effect as if the judgments or decrees were rendered in a circuit court, and they operate as a *supersedeas* and stay execution only where the writ is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree. *Ibid*.

§ 1447. Appeals and writs of error do not become a *supersedeas* by virtue of any process issued by the supreme court, but they are constituted such by the act of congress when the conditions prescribed by section 23 of the judiciary act are fulfilled. *Ibid*.

§ 1448. A motion for a *supersedeas* is not premature, though made before the return day of the writ of error, where it appears that the court to which the writ was addressed has

made return to the same, and that the plaintiff has filed in the clerk's office a copy of the record duly certified as required by law. *Ibid.*

§ 1449. Injunctions were granted in a lower court of a state, and on suspensive appeals to the supreme court of the state the decrees of the lower court were affirmed, and the cases were brought to the United States supreme court by writ of error. *Held*, that the writ of error operated alone upon the state supreme court, and that the federal court could not enjoin the lower state court from giving effect to the injunctions. *Ibid.* See § 1588.

§ 1450. A writ of error to a state court cannot have any greater effect than if the judgment or decree had been rendered or passed in the circuit court, and neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in the supreme court. *Ibid.*

§ 1451. A justice of the supreme court has no power to grant a *supersedeas* on a writ of error or an appeal, unless the writ of error was sued out and served, or the appeal taken within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of. *Sage v. Central R. Co.*, §§ 1493-1498.

§ 1452. To make a *nunc pro tunc* order effectual for a *supersedeas*, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done. *Ibid.* See § 1558.

§ 1453. A motion to set aside a decree, made by persons not parties to the suit, will operate a suspension of the decree so that an appeal subsequently taken by such parties may be held to be in time to operate as a *supersedeas*. *Ibid.*

§ 1454. A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element, and one which cannot be disregarded. *Ibid.*

§ 1455. In order that a writ of error may operate as a *supersedeas*, it must be issued within sixty days after the final judgment is rendered; and where the appellate court of a state renders judgment, that judgment is the final judgment, and not the proceeding of the lower court on receiving the *remittitur*. *Wurts v. Hoagland*, § 1499.

§ 1456. When the statute is complied with, a writ of error operates as a *supersedeas* without an order of court; and the omission to prepare the citation and have it signed within sixty days after the judgment will not entitle the opposite party to a writ of possession when the other steps necessary to obtain a *supersedeas* have been taken. *Tiernan v. Booth*, §§ 1500, 1501.

§ 1457. The service of a writ of error, or the perfection of an appeal, within sixty days, Sundays exclusive, after the rendering of the judgment, or the passing of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and it is not within the power of a justice or judge of the supreme court to grant a stay of process on the judgment or decree, if this has not been done. *Kitchen v. Randolph*, §§ 1502-1504.

§ 1458. The provision of the statute, to the effect that when a writ of error may be a *supersedeas* executions shall not issue until the expiration of ten days, applies to judgments and decrees of the federal courts, and not to those of state courts. *Doyle v. Wisconsin*, §§ 1505, 1506.

§ 1459. Under the act of June 1, 1872, a writ of error will stay execution if the security be given within sixty days after the rendition of the judgment. The issuance of the writ of error must precede the execution of the bond, but it may be served at any time before, or simultaneously with, the filing of the bond; it need not be served within ten days from the rendering of the judgment. *Telegraph Co. v. Eyser*, §§ 1507, 1508.

§ 1460. An appeal will operate as a *supersedeas* if taken within ten days, Sundays exclusive, after rendering final judgment, or within ten days from the time the judgment is entered in form. *Silsby v. Foote*, §§ 1509, 1510. See § 1563.

§ 1461. Where a judgment of a lower court is affirmed in an appellate court, and the record is sent down, with an order to enter judgment, the time within which a writ of error must be sued out so as to operate as a *supersedeas* dates from the entry of the judgment in the lower court. *Green v. Van Buskerk*, §§ 1511, 1512.

§ 1462. An appeal will operate as a *supersedeas* if duly taken and bond approved within ten days after a petition to open the final decree is overruled. *Brockett v. Brockett*, §§ 1513-1516. See § 1567.

§ 1463. An appeal was dismissed for want of prosecution, and the circuit court, on petition, granted another appeal, and entered a supplemental decree for the execution of the original decree, from which supplemental decree an appeal was taken. *Held*, that the second appeal did not operate as a *supersedeas*, and that, therefore, the appeal from the supplemental decree would not lie. *Carr v. Hoxie*, § 1517.

§ 1464. The lower court may, notwithstanding a *supersedeas*, make the necessary orders to preserve the fund in litigation, and direct its receiver to that extent, but it cannot place the money beyond the control of any decree that may be made by the supreme court. A

supersedeas follows as a matter of law from a compliance by the appellant with the provisions of the act of congress, and if the lower court is proceeding, through mistake or otherwise, to execute its judgment or decree, the supreme court may restrain it. *Goddard v. Ordway*, §§ 1518, 1519.

§ 1465. If a writ of error and bond are filed before the expiration of ten days from the entering of the decree, no execution can issue; and under the act of 1872, upon the filing of the bond within sixty days, a *supersedeas* may be obtained, but such *supersedeas* only stays further proceedings, and does not interfere with what has been done. So where a judgment removing a party from office was read on the 21st of January, but entered as of the 20th, and on the 2d of February a writ was directed to issue to carry the judgment into effect, and on the 3d the writ was served, and afterwards, on the same day, a bond was approved and filed in the clerk's office, the supreme court refused to restore the party to office. *Board of Commissioners v. Gorham*, §§ 1520, 1521. See §§ 1560, 1582.

§ 1466. The time within which the bond must be filed dates from the announcement of the decision, where the form of the judgment is then settled. (*Silsby v. Foote*, 20 How., 290, distinguished.) *Ibid.*

§ 1467. An appeal will not remove a common law proceeding, and an appeal bond in such case will not operate as a *supersedeas*. And where a writ of error is subsequently sued out, the bond must be given within ten days after the rendition of the judgment in order to stay execution; and it is not competent for the circuit court to stay the execution on account of the mistake as to the time or manner of removing the case, whether the mistake was made by the party or by the court. The federal courts are not authorized to dispense with the express provisions of the acts of congress regulating appeals and writs of error. *Saltmarsh v. Tuthill*, §§ 1522-1524.

§ 1468. An appeal from a decree in chancery will not operate as a *supersedeas* unless an appeal bond be executed as required by law; and the bond must be executed within ten days after entering the decree. *Adams v. Law*, §§ 1525-1527.

§ 1469. Where the approval of a bond is procured by perjury and fraud, the *supersedeas* will be vacated, and the court will refuse to accept a new bond. *Railroad Co. v. Schutte*, §§ 1528-1530.

§ 1470. A justice of the supreme court may approve a *supersedeas* bond in a circuit other than the one to which he is assigned; and he may approve the bond after it has been rejected by the circuit court. *Sage v. Railroad Co.*, §§ 1531, 1532.

§ 1471. Non-residence of the sureties within the district is not a sufficient ground for refusal to approve a bond as a *supersedeas*. But in such case the supreme court refused to award a *mandamus*, but ordered a *supersedeas* on the filing of a sufficient bond. *Ex parte The Milwaukee R. Co.*, §§ 1533, 1534.

§ 1472. A bond is not sufficient either for an appeal or a *supersedeas*, unless it contains security for costs; but the court will not dismiss the appeal if the appellant will file a sufficient bond within a given time. *Seward v. Corneau*, § 1535.

§ 1473. A writ of error bond, to operate as a *supersedeas*, must be sufficient to secure the whole amount of the judgment. In this case the bond being taken for an amount sufficient to cover damages and costs, time was allowed to file a sufficient bond. *Catlett v. Brodie*, § 1536. See § 1568.

§ 1474. In order to supersede a decree for the foreclosure of a mortgage, the security must equal the amount found to be due. And it is not material in such case that the mortgaged property is under the control of a receiver who has given bonds for the faithful discharge of his duties, and that he has hired the property to persons who have also given bonds. *Stafford v. Union Bank of Louisiana*, §§ 1537-1539. See § 1568.

§ 1475. If, after security on a *supersedeas* bond has been accepted by a justice of the supreme court, the circumstances of the case, or of the parties, or of the sureties on the bond, have changed, so that security which, at the time it was taken, was good and sufficient, does not continue to be so, the supreme court may, upon a proper application, so adjudge and order as justice may require. But upon facts existing at the time the security was accepted, the action of the justice within the statute and within the rules of practice adopted for his guidance is final, and the supreme court will presume that when he acted every fact was presented to him that could have been. *Jerome v. McCarter*, §§ 1540-1545.

§ 1476. A *supersedeas* bond is not required to cover accumulations of interest on mortgaged property; and especially where the property has passed into the hands of appellant's assignee in bankruptcy, and the appellant is no longer in a condition to accumulate property. *Ibid.* See § 1568.

§ 1477. The amount of a *supersedeas* bond is to be determined by the court allowing the *supersedeas*, in its sound discretion, under the laws and the rules of the supreme court. *United States v. Mayor, etc., of New Orleans*, §§ 1546-1548. See § 1568.

§ 1478. Where the judgments sought to be stayed are not for money or property, but to direct the performance of a ministerial act, to wit, the levy of taxation, looking to the payment of a specific sum of money, and the defendants are municipal officers, having little or no pecuniary interest in the matter, rule 29 of the supreme court does not apply in fixing the amount of the bond. (In this case the bonds were fixed at the sum of \$150, plus ten per cent. of the amount of the judgments sought to be stayed.) *Ibid.*

§ 1479. In this case the circuit justice, at chambers, refused to increase the amount of a *supersedeas* bond, after the writ of error had been allowed, although it appeared that the probable emoluments and fees would accumulate to an amount exceeding the penalty in the bond. *Butchers' Association v. Slaughter House Co.*, §§ 1549, 1550.

§ 1480. As soon as a writ of error or appeal is allowed, the jurisdiction of the supreme court attaches to the case and supersedes the further action of the judge at chambers. *Ibid.*

§ 1481. Appeals and writs of error to the supreme court operate as a *supersedeas* as soon as proper security is given, if taken within the proper time. An order to that effect is not necessary. *Ibid.* See § 1553.

§ 1482. Where a justice of a lower court grants an appeal, signs a citation, and approves a bond which operates as a *supersedeas*, he has exhausted his powers, and cannot thereafter vacate the *supersedeas* and require an additional bond; if the allowance of the appeal, etc., were the act of the court, it might, like any other order in the suit, be set aside on proper showing during the term. *Draper v. Davis*, § 1551.

§ 1483. The case of *Jerome v. McCarter*, 21 Wall., 17, to the effect that if by reason of a change of circumstances the security on the *supersedeas* bond becomes insufficient, the court may order as justice may require, affirmed. *Williams v. Claflin*, § 1552. See § 1475.

[NOTES.—See §§ 1553-1593.]

SLAUGHTER-HOUSE CASES.

(10 Wallace, 273-299. 1869.)

ERROR to the Supreme Court of Louisiana.

Motion to enforce a *supersedeas* on a writ of error to the supreme court of the state of Louisiana, and to enjoin the district court, from which appeals had been taken to the said supreme court, from enforcing its injunctions. The facts are stated in the opinion.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—All persons and corporations, except the Crescent City Live-stock Landing and Slaughter-house Company, are prohibited, by an act passed by the legislature of the state of Louisiana, to land, keep or slaughter any cattle, beeves, calves, sheep, swine or other animals, or to have, keep or establish any stock-landings, yards, pens, slaughter-houses or abattoirs at any point or place within the city of New Orleans or the parishes of Orleans, Jefferson and St. Bernard, or at any place on the east bank of the river within the corporate limits of the city, or at any point on the west bank of the same above the railroad depot therein mentioned and designated. Said act was passed on the 8th day of March, 1869, and is entitled an act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate "the Crescent City Live-stock Landing and Slaughter-house Company." Though approved on the day mentioned, still the act did not go into operation till the 1st day of June following, but it appearing that the company created and organized under the act intended to enforce the prohibition, the plaintiffs in the suit first mentioned, on the 26th of May of that year, filed a petition or bill of complaint in the sixth district court of New Orleans against that company, alleging that for more than thirty years past there had existed in the parish of Orleans and the adjacent parishes the lawful trade of butchering domestic animals to supply with meat the markets of the city and the adjacent parishes, and that the regular pursuit of that trade involved the necessity of collecting, feeding and

sheltering such animals before they were slaughtered, and of preparing and preserving their meat for use or sale for food, and their hides, tallow and other valuable parts of the animals for the market; that a thousand persons throughout that period have been engaged in that trade without interruption and unmolested prior to the organization of that company by any ordinance, regulation or enactment from any public authority; that they, the petitioners, are duly incorporated under a law of the state, and that for more than two years they have been and are in the lawful exercise of that trade and employment, and that they have constructed and erected for that purpose, and now hold within those parishes, places for landing cattle and for sheltering the same, and slaughter-houses for butchering the animals for market, and have secured stalls and such other privileges in the market-places as are necessary and convenient to the prosecution of the business; that the respondents, though they must well know that the act is in violation of the constitution of the United States, openly declare that it is their intention to execute its provisions and to compel the complainants to abandon the objects of their incorporation, and to destroy the value of their investments, and render it necessary for them to relinquish their lawful pursuit and the prosecution of their legitimate business. Wherefore they pray that the respondents may be enjoined from any such interference with the petitioners, and from interfering, directly or indirectly, by suit or otherwise, with their customers in purchasing, slaughtering or butchering animals of any kind used for meat, during the pendency of the suit, and also for process, and that they, the complainants, may have judgment against the respondents in damages for the sum of \$10,000.

On the same day the respondents in that suit instituted in the fifth district court of New Orleans a counter suit against the complainants in the suit commenced against them in the sixth district court of the same municipality. They allege in their petition that "the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business in that city and its environs is vested in their company, as is fully set forth in the act of their incorporation; that the corporation named in their petition, as respondents, are about to land, shelter and protect cattle, etc., intended for slaughter, and to conduct and carry on the live-stock landing and slaughter-house business within the limits of the city as prohibited by law and in violation of their exclusive rights and privileges. Wherefore they pray that the respondents, the complainants in the suit pending in the sixth district court, may be enjoined and prohibited from landing, stabling and sheltering cattle, etc., and other animals destined for sale and slaughter in that city, and from conducting and carrying on the live-stock landing and slaughter-house business within the limits of the parishes described in their charter, and from molesting and interfering with the petitioners in the exercise and enjoyment of their exclusive rights and privileges; and they also claim damages in the sum of \$4,000, and for general relief."

Judgment in the first suit was rendered for the petitioners, and it was ordered that the injunction previously issued in the case against the respondents should be made perpetual. Pursuant to the suggestion of the respondents in that case, that there was error to their prejudice in the final judgment of the sixth district court, it was ordered "that a suspensive appeal be granted herein to the defendants, returnable to the supreme court of the state." Hearing was also had in the suit commenced in the fifth district court by the Crescent City Live-stock Landing and Slaughter-house Company against The Butchers' Benevolent

Association of New Orleans, and it was ordered, adjudged and decreed in that case, that there be judgment in favor of the petitioners, and that the corporation respondents, their president and members, be forever enjoined and prohibited, as prayed in the petition. Exceptions having been filed to certain rulings of the court, it was also ordered, on motion of the respondents, that they, the respondents, be allowed a suspensive appeal to the supreme court of the state, as in the preceding case.

Separate suits were also commenced in the seventh district court of the city against the Crescent City Live-stock Landing and Slaughter-house Company by Hotair Imbau *et al.*, and by the Live-stock Dealers' and Butchers' Association of New Orleans, as appears by the transcripts filed here in those cases. Injunctions were prayed and granted against the respondents in both of those cases, and they, the respondents, were allowed suspensive appeals to the supreme court of the state from the respective judgments.

Suit was also commenced in behalf of the state by the attorney-general against Paul Esteben *et al.*, in which it is alleged that they have, without authority of law, formed themselves into a corporation by the name of the Live-stock Dealers' and Butchers' Association of New Orleans; that they, as such corporation, are about to lease or purchase a certain tract of land partly in the city and partly in the parish of St. Bernard, and that they are about to commence the erection of buildings and structures thereon for the purpose of collecting, landing and sheltering beef-cattle designed for food, to be sold in the parishes of Orleans, Jefferson, and St. Bernard, contrary to the act of the general assembly of the state. Wherefore the petitioner prays that a writ of injunction may issue restraining and enjoining the respondents from using that tract of land for the purpose set forth in the petition, and from slaughtering any beef-cattle or any other animals intended to be sold for food in those parishes. Final judgment in the case was rendered in favor of the state, and it was also ordered, adjudged and decreed that the respondents be forever enjoined and restrained, as prayed by the petition. Attempt was made by the respondents to secure a rehearing, but the motion was denied, and on their petition it was ordered that they be allowed a suspensive appeal to the supreme court of the state, as in the preceding cases.

These several appeals, together with one other which it is unnecessary to describe, were duly entered in the supreme court of the state, and were, by the written agreement of the parties, submitted for decision at the same time. They were submitted on the 28th of January, 1870, and the opinion of the appellate court was delivered on the 11th of April following. Pursuant to that opinion the judgment of the sixth district court, as rendered in the first case, was reversed, and the directions of the supreme court of the state were that the injunction granted by the subordinate court should be dissolved, and that the demand of the petitioners should be rejected with costs in both courts. They also rendered a judgment of reversal in the same form and with the same directions in the third and fourth cases, being the two appeals from the judgments rendered in the seventh district court. Judgments of affirmance were also rendered on the same day in the second and fifth cases, in the order herein adopted, with costs of appeal. Where the decision in the court below sustained the pretensions of the Crescent City Live-stock Landing and Slaughter-house Company the judgment of the subordinate court was affirmed, but the judgment of the subordinate court was reversed in each case where the decision of the subordinate court was adverse to those pretensions, and the injunctions in those cases

were dissolved. Petitions for rehearing were filed by the losing parties on the 26th of April, 1870, and on the 9th of May following an entry was made in each case that the petition for rehearing was refused. Writs of error to the state court were subsequently prayed by the same parties, and on the 13th of May last the writs of error were allowed by the associate justice of this court allotted to that circuit, and they were duly filed on the 16th day of the same month, as appears of record.

§ 1484. *Writs of error filed within ten days after refusal of petition for rehearing, sufficient bonds having been given, operate as a supersedeas.*

Filed, as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a *supersedeas* and stay execution under the twenty-third section of the judiciary act. Doubts were at one time entertained upon that subject, but since the decision in the case of *Brockett v. Brockett*, 2 How., 238, the question must be considered as settled, in accordance with the views of the plaintiffs. Sufficient bonds were given in each of these cases, which is necessary in every case, in order that the appeal or writ of error may operate as a *supersedeas* and stay execution on judgments removed into this court for re-examination. What is necessary is that the bond shall be sufficient, and when it is desired that the appeal or writ of error shall operate as a *supersedeas* the bond must be given within ten days from the date of the decree or judgment. *Rubber Co. v. Goodyear*, 6 Wall., 155.

§ 1485. *A writ of error to a state court operates as a supersedeas, when.*

Suppose the writs of error were seasonably sued out and that they operate in each case as a *supersedeas* and stay execution, as provided in the twenty-third section of the judiciary act, still the court is of the opinion that the several motions under consideration must be denied upon other grounds, and for reasons which are entirely satisfactory. Controversies determined in a state court which are subject to re-examination in this court, are such, and such only, as involve some one or more of the questions enumerated and described in the twenty-fifth section of the judiciary act, and which have passed to final judgment or decree in the highest court of law or equity of a state in which a decision in the suit could be had, as provided by the constitution and laws of the state. Appeals were taken in the cases before the court from the respective district courts, where they were commenced, to the supreme court of that state before the writs of error granted by this court were sued out, and the decrees or judgments brought here for re-examination are the final decrees or judgments of the supreme court of the state in those cases. Writs of error issued under the twenty-fifth section of the judiciary act have the same effect as if the judgments or decrees were rendered in a circuit court, and they operate as a *supersedeas* and stay execution only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree. 1 Stats. at Large, 85. Such a writ of error is in the nature of a commission by which the judges of one court are authorized to examine a record upon which a judgment or decree was given in another court, and on such examination to reverse or affirm that judgment or decree. When regular in form, and duly served, the writ of error operates upon the record of the court to which it is addressed in the case described in the writ, and it has the effect to remove that record into the court granting the writ of error and to submit it to re-examination; and the twenty-third section of the judiciary act provides

to the effect that where all the conditions prescribed in that section concur in the case, the jurisdiction of the court where the record remained when the writ of error was sued out and served shall be suspended until the cause is determined by or remanded from the appellate tribunal. *Cohens v. Virginia*, 6 Wheat., 410; *Suydam v. Williamson*, 20 How., 437; *Barton v. Forsyth*, 5 Wall., 192. Exceptional cases arise where the judgment or decree given on appeal in the highest court of a state is required by the law of the state to be returned to the subordinate court for execution, and in such cases it is held that the writ of error from this court may operate as a *supersedeas*, if granted and served at any time within ten days from the return entry of the proceedings in the court from which the record was removed, but in all other cases the writ of error must be issued and served within ten days from the date of the judgment or decree, in order that it may operate as a *supersedeas* and stay execution. *McGuire v. Commonwealth*, 3 Wall., 386; *Gelston v. Hoyt*, 3 Wheat., 246; *Green v. Van Buskerk*, 3 Wall., 450.

§ 1486. *Appeals and writs of error become a supersedeas, not by virtue of process issued by the supreme court, but by the provisions of the judiciary act.*

Appeals and writs of error do not become a *supersedeas* and stay execution in the court where the judgment or decree remains by virtue of any process issued by this court merely as such, but they are constituted such by the act of congress when the conditions prescribed in the twenty-third section of the judiciary act are fulfilled. Where those conditions are complied with the act of congress operates to suspend the jurisdiction of the court to which the writ of error is addressed, and stay execution in the case pending the writ of error and until the case is determined or remanded. *Hogan v. Ross*, 11 How., 296; *United States v. Addison*, 22 id., 183; *Hudgins v. Kemp*, 18 id., 535; *Adams v. Law*, 16 id., 148.

§ 1487. *Writ of error must be sued out within ten days, except in certain cases.*

Power to issue a *supersedeas* to a judgment rendered in a subordinate court does not exist in this court where the writ of error is not sued out and served within ten days from the date of the judgment, except where the aggrieved party is obliged to sue out a second writ of error in consequence of the neglect of the clerk below to send up the record in season, or where the granting of such a writ is necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district. *Hogan v. Ross*, 11 How., 296; *Ex parte Milwaukee Railroad Co.*, 5 Wall., 188; *Stockton v. Bishop*, 2 How., 74; *Wallen v. Williams*, 7 Cr., 279; *Saltmarsh v. Tuthill*, 12 How., 389; *Hardeman v. Anderson*, 4 id., 640.

§ 1488. *Motion to enforce a supersedeas is not premature, though made before the return day of a writ of error, where return is made and the record filed in the clerk's office.*

Undoubtedly the writs of error in these cases were seasonably sued out and served, and it is equally clear that the parties in whose favor they were granted complied in each case with all the conditions prescribed in the act of congress as necessary to give the writ effect as a *supersedeas* and stay execution, as contended by the plaintiffs in the pending motions. Such proceedings operate as a stay of execution, and it is well settled that if the subordinate court, under such circumstances, proceeds to issue final process, it is competent for this court to issue a *supersedeas*, as an exercise of appellate power, to correct the error.

Stockton *et al.* v. Bishop, 2 How., 75. Doubt upon that subject cannot be entertained where it appears that the court to which the writ of error was directed has made the return of the same to the proper term of the court, pursuant to the commands of the writ, and the same has been duly entered on the calendar. Objection is made, however, that the motions before the court are premature, as the return day of the writ of error is the first day of the next term; but we are of the opinion that the court possesses the power to grant a remedy in such a case even before the return day of the writ of error, where it appears that the court to which it was addressed has made return to the same, and that the plaintiff has filed in the clerk's office a copy of the record duly certified as required by law. Except in a case of urgent necessity the court, in the exercise of a proper discretion, might well decline to exercise the power before the return day of the writ, but the better opinion, we think, is that the jurisdiction for such a purpose attaches from the time the party in whose favor the writ of error is granted has complied with all the conditions prescribed in the act of congress to make the writ of error operate as a *supersedeas* and stay of execution. Railroad Co. v. Bradleys, 7 Wall., 575.

§ 1489. *Motion to enforce supersedeas upon writ of error to a state supreme court denied, where it appears that such court has done nothing since the writ was issued.*

Grant all this, still the court is of the opinion that the motions cannot be granted, as it is conceded that nothing has been done by the supreme court of the state since the writs of error were served and became a *supersedeas*, inconsistent with the prohibition contained in the act of congress which gives the writs of error that effect. Argument upon that topic is unnecessary, as the affidavits filed in support of the motions affirm nothing of the kind, nor do the plaintiffs set up any such theory. Incorporated as the respondents in the motions are by the general assembly of the state, they claim the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits described and the privileges granted in the act giving them corporate powers. On the other hand, the plaintiffs contend that the act granting them such exclusive privileges is in violation of the constitution of the United States, and void, and that they, the plaintiffs, have equal right to establish a live-stock landing, and to erect slaughter-houses and to conduct and carry on that business as if no such special privileges had been granted to the respondents. Injunctions were obtained by each party against the other in the courts where the suits were commenced, but appeal was taken, in each case, by the losing party, to the supreme court of the state, where the injunctions previously granted against the respondents in the motions were dissolved and those previously granted against the plaintiffs were made perpetual. Judgments of reversal on the one side and of affirmance on the other were accordingly rendered by the supreme court of the state in the respective causes, as before explained, and it is to those judgments and to that court that the writs of error in question were directed and addressed. Those judgments remained in the supreme court of the state when the respective writs of error were sued out and became a *supersedeas* and stay of execution, and the records show that that court has neither reversed nor modified the judgments, nor any one of them, nor has that court done anything to vary or impair the rights of the parties or to carry the judgments into effect. Subsequent to the commencement of these several suits, but before the judgments were rendered in the supreme court, the general assembly of the state created another court in

that city, called the eighth district court, and conferred upon that tribunal the exclusive original jurisdiction of injunction causes, and also made provision in the same act for the removal of such causes from other courts to that jurisdiction. *Supersedeas* writs of error having been sued out by the plaintiffs to the respective judgments rendered in the supreme court, they claimed that the injunctions against them granted by that court were inoperative, and their theory was, and still is, that the writs of error had the effect to dissolve or suspend the injunctions granted by the supreme court of the state and to restore and render operative the injunctions decreed in the subordinate courts. Governed by these views, the plaintiffs denied that the respondents could claim to exercise any such exclusive privileges as those described in their charter, and proceeded to make the necessary preparations for carrying on the same business. Opposite views were entertained by the respondent corporation and by the state authorities, and especially by the attorney-general, and for the purpose of testing the question he moved in the fifth district court that the fifth case embraced in the motions, as here classified, should be removed into the eighth district court, and the motion was granted. Application was then made by him to the latter court to enforce the judgment rendered on appeal in that case by the supreme court of the state, making perpetual the injunction originally granted by the court from which the cause was removed, but the court refused to grant the motion, because, as the court held, the writ of error sued out in the case operated as a *supersedeas*.

Attempt is not made to call in question the correctness of that decision, but the attorney-general on the same day obtained a rule in that court against all the respondents in that case, except one, to show cause, if any, why they should not be punished for contempt, as having violated the injunction granted in the case before the same was appealed to the supreme court of the state. Service was made under the rule, and the respondents appeared, and were fully heard, but it appearing that the respondents had acted under the advice of counsel, the court refused to inflict any punishments. Directions, however, were given to the sheriff in the form of an order to enforce the preliminary injunction granted by the fifth district court. Proceedings of an original character were also instituted by the present respondents in the same district court, in which they prayed that the board of metropolitan police might be enjoined to prevent all persons, except the petitioners in that case, from conducting or carrying on the live-stock landing and slaughter-house business within their chartered limits. Accompanying that petition was an affidavit of merits, and upon that petition and affidavit an injunction was granted as prayed. Three days later, to wit, on the 6th of June last, the attorney-general intervened for the state in the suit, and adopted the petition and prayed that the injunction might be made perpetual. Various motions were made by parties opposed to the proceedings to dissolve or modify the injunction, but they were all overruled and denied by the court. No appeal was taken to the supreme court of the state, nor does it appear that any attempt was made by the respondents in any form to cause the proceedings to be re-examined in the court of last resort. They regarded it as unnecessary to seek any such revision of the proceedings, as they insist that the legal effect of the writ of error issued from this court to the supreme court of the state was to vacate the injunction granted by the latter court and to continue in force the suspensive features of the appeals allowed by the subordinate courts. Beyond doubt, the appeal in the form granted by the subordinate court operated as a stay of execution, and suspended the

jurisdiction of the court to proceed further in the cause until the same should be determined or remanded, but the supreme court rendered a final judgment in the case and granted a perpetual injunction.

Whatever conditions were annexed to the appeal in the subordinate court were abrogated by the final judgment of the appellate tribunal, as the appeal was then fully executed. Had no writ of error been granted by this court, the plaintiffs, it is presumed, would admit the correctness of that rule, but they insist that the effect of the writ of error, if made a *supersedeas*, is that it suspends the judgment of the supreme court and leaves the judgment of the subordinate court in full operation during the pendency of the writ of error. Independent of statutory regulations, the term *supersedeas* has little or no application in equity suits, as the rule is well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court. General Order, 15 Ves., 184; *Waldo v. Caly*, 16 id., 209; *Willan v. Willan*, 16 id., 216; 2 Dan. Ch. Prac., 1547. Proceedings are stayed in the courts of New York by appeal in a chancery suit to the extent that if the party desires to proceed, notwithstanding the appeal, on the point from which the appeal was taken, he must make application to the chancellor for leave. *Green v. Winter*, 1 Johns. Ch., 80. Different rules upon the subject prevail in different jurisdictions, but the act of congress provides that appeals in the federal courts shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error. 2 Stats. at Large, 244.

§ 1490. *Appeals do not lie from a state court to the United States supreme court in any case.*

Appeals do not lie from a state court to this court in any case, as the act of congress gives no such remedy. Rules and regulations prescribed by law of course control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court denying an application for an injunction does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity. *Hart v. Mayor*, 3 Paige, 381; *Graves v. Maguire*, 6 id., 380; *Merced Mining Co. v. Fremont*, 7 Cal., 131; *McGarahan v. Maxwell*, 28 id., 91; Louisiana Code of Practice, art. 307; *Delacroix v. Villere*, 11 La. Ann., 39; *White v. Cazenave*, 14 id., 57; *Knabe v. Fernot*, 14 id., 847. Separate examination of the several cases before the court, as respects the effect of the writs of error upon the judgments removed into this court, may well be omitted, as the plaintiffs were the losing party in all the appeals from the courts of original jurisdiction to the supreme court. They prevailed in three of the suits in the district courts, but they were defeated in the supreme court in all the cases.

§ 1491. *Neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in the supreme court.*

Viewed in any light, it is clear that a writ of error to a state court cannot have any greater effect than if the judgment or decree had been rendered or passed in a circuit court, and it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

Judgments and decrees of the circuit court are brought here for re-examination, and so are the judgments and decrees of a state court, and the only effect of the *supersedeas* is to prevent all further proceedings in the subordinate court except such as are necessary to preserve the rights of the parties.

§ 1492. *The provision in the act of 1793, "nor shall a writ of injunction be granted to stay proceedings in any court of a state," applies to the supreme court as well as to the circuit court.*

Reference is also made to the fifth section of the act of the 2d of March, 1793, as conferring power upon this court to enjoin the proceedings in the eighth district court, but the conclusive answer to that suggestion is that there is no appellate relation between a subordinate state court and the supreme court of the United States, and where no such relation is established by law, the prohibition of that section — "*nor shall a writ of injunction be granted to stay proceedings in any court of a state*" — applies to the supreme court as well as to the circuit court. 1 Stats. at Large, 335.

Final judgments or decrees in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, may be removed here for re-examination if they involve some one or more of the questions specified in the section conferring the jurisdiction, and otherwise come within the rules which regulate that jurisdiction. Appeals lie, it is conceded, from the district courts of that state to the supreme court, as fully appears also from the records in these suits, which shows to a demonstration that this court possesses no power to grant any relief to the plaintiffs under the act of congress on which these motions are founded.

Motions denied.

Dissenting opinion by MR. JUSTICE BRADLEY.

I dissent, with some diffidence, from the opinion of the court, on the following grounds:

1st. That notwithstanding the act of congress declares that a writ of error shall be a *supersedeas* if certain conditions are performed, the judgment of the court has the effect of leaving many classes of decrees and judgments *in equity*, though appealed from, entirely effective and operative between the parties, whereas the writ of error ought to suspend the effect and operation thereof until the case is heard in this court.

2d. That the judgment of this court will have the effect to allow subordinate state courts to evade the *supersedeas* of a writ of error in all cases where the court of last resort remits the record to them for execution. The judgment of this court disclaims all jurisdiction over the acts of the subordinate state courts, and thereby, in my judgment, surrenders a very important power necessary to the effective support of its appellate jurisdiction.

3d. That the judgment of the court remits the practice on this subject substantially back to the practice of the English courts of equity, in which it is conceded that an appeal does not suspend proceedings nor act as a *supersedeas* on the proceedings in the court appealed from; and in effect departs from the act of congress, which declares that a writ of error or an appeal in the federal courts *shall* be a *supersedeas*.

4th. That the effect of the judgment of the court is to disclaim its just control over the *parties to the record*.

SAGE *v.* CENTRAL RAILROAD COMPANY.

(3 Otto, 412-420. 1876.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The Farmers' Loan and Trust Company, trustee for the bondholders secured by a mortgage of the Central Railroad Company of Iowa, whose claims amounted in the aggregate to \$3,700,000, exclusive of interest, commenced a suit in the circuit court of the United States for the district of Iowa, October 14, 1874, to foreclose the mortgage for the benefit of all parties interested in the security. This was done at the request of a large number of the bondholders, and after much consultation between them in regard to their common interests. After the cause had been pending for nearly a year, and at some time between October 1 and October 22, 1875, Russell Sage, F. Leake, James Buell and Edwin Parsons presented a communication to the trustee, a copy of which is as follows:

"To the Farmers' Loan and Trust Company, Trustee, etc., First Mortgage Bondholders:

"GENTLEMEN — We are informed by your counsel, Grant and Smith, that they will ask the court, in the foreclosure suit now pending, to enter such decree as the majority of the bondholders desire. Believing that some of the bondholders have other interests to serve than to protect the first mortgage bondholders, and that large numbers of the bondholders, from want of proper information, have been induced to sign various requests to the court for certain forms of decree injurious to us as bondholders, and being your *cestui que trust* to the amount set opposite our names of the first mortgage bonds, to secure the payment of which you hold the mortgage as trustee for ourselves and others similarly situated, this is to notify you of such interest on our part, and to request you to instruct your counsel to procure the ordinary decree of foreclosure and sale; and, failing to get this from the court, to take an appeal to the supreme court of the United States. If, for any reason, you decline to give your counsel such instructions, please inform us, that we may become a party to said proceedings, and take such course as we may be advised in the matter. We understood the trust deed to require you to procure the ordinary decree of foreclosure and sale. If the bondholders, or a majority of them, request you to purchase the mortgaged premises, and to form a new company, that it is competent for you to do so, upon such terms and conditions as a majority of the bondholders desire; but, until you do so purchase, you are to do all you reasonably can be expected to do to protect the minority as well as the majority of your *cestui que trust*.

"Respectfully, your obedient servants,

"RUSSELL SAGE, \$100,000.

"F. LEAKE, by Russell Sage, \$25,000.

"JAMES BUELL, \$10,000.

"EDWIN PARSONS, \$13,500.

"NEW YORK, October 1, 1875."

A term of the court commenced October 11, 1875; and on the 22d of that month, the Farmers' Loan and Trust Company, the Central Railroad Company of Iowa and all the other defendants, together with committees of various bondholders, represented by their respective attorneys, appeared in court and agreed to the form of a decree to be entered in the cause, the same having been the result of consultation and compromise among the parties in interest. At the same time the Farmers' Loan and Trust Company exhibited to the

court the communication it had received from Sage and his associates, accompanied by a statement that Buell had deposited with it as trustee \$10,000 of bonds secured by the mortgage, Leake \$25,000, and Sage \$100,000, and that it was ready to execute any decree which might be made by the court under the circumstances. The court thereupon, without considering the rights and interests of the various parties, entered October 22, 1875, the decree agreed upon, and then adjourned until some time in January, 1876.

Down to this time neither Sage nor any of his associates had asked to be made parties to the suit, or to be permitted to intervene in any manner for the protection of their interests, but, December 16, 1875, Sage, Buell and N. A. Cowdrey presented to the circuit judge, at St. Paul, Minnesota, the Iowa circuit court not being then in session, a petition, as follows: "Now comes the Farmers' Loan and Trust Company, as trustee in said cause for Russell Sage, James Buell and N. A. Cowdrey, and plaintiff in said cause, and prays of the court that an appeal may be allowed to said plaintiff, and tenders to the court an appeal bond, with a request that the same may operate as a *supersedeas*." Signed, Farmers' Loan and Trust Company, by Grant and Smith, solicitors.

Upon this petition the circuit judge entered his order as follows: "In this case an appeal is asked by the complainant so far, and only so far, as it affects the interests of Russell Sage, James Buell and N. A. Cowdrey. I deny the appeal prayed for, because, 1. The decree in question was entered by consent of all the parties in interest. (The term at which this decree was rendered has not yet ended, but stands adjourned until in January next; and the proper course for the parties in whose behalf an appeal is sought is for them to appear, and, if the decree is erroneously entered, or is improper, to apply to be made parties, or to have the decree corrected, or a new decree entered.) 2. An appeal cannot be taken on behalf of certain bondholders, not parties to the record, leaving the rest of the decree unappealed from. As the trustees (complainants) do not ask for an appeal from the whole decree, I need not consider when they would be justified in a case where there are several millions of dollars of bondholders who acquiesce in the decree, to appeal at the instance of three bondholders who only claim to hold bonds to the extent of \$200,000. 3. If an appeal could be allowed, as asked for, the bond offered is insufficient, as to amount, to secure costs, damages for delay, and costs and interest on the appeal. The clerk will enter the above order of record, denying the appeal prayed for.

(Signed)

"JOHN F. DILLON, Circuit Judge.

"AT CHAMBERS, ST. PAUL, December 16, 1875."

The court met pursuant to adjournment, and, January 11th, Sage, Buell and Cowdrey, claiming to be the owners of \$200,000 of the bonds secured by the mortgage, filed their petition for leave to intervene in the suit as plaintiffs or defendants, to the end that they might have opportunity to protect the interests they had in common with the other holders of bonds, and with liberty to appeal to this court. January 13th they filed a motion to set aside the decree of October 22d. On the next day, January 14th, the cause came on for hearing upon the motion filed January 13th, the petition filed January 11th, and the petition presented to the circuit judge December 16th, with his order thereon. The motion to set aside the decree was denied, and as to the other petition the following order was made: "Upon consideration of the premises, it is now by the court ordered, that Sage, Buell and Cowdrey be, and they are hereby, permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and in their own names, an appeal to the

supreme court from the decree entered herein on the 22d day of October, 1875; and if said Sage, Buell and Cowdrey desire said appeal to operate as a *supersedeas*, the bond for that purpose is fixed at the sum of \$1,000,000, to be given in thirty days from this date; and, if so given, said appeal shall be regarded as taken and perfected on the 16th day of December, 1875, the said parties having then applied as aforesaid for said appeal, and having delayed the same until this time by order of the judge at chambers, as above shown; but if said appeal is not to operate as a *supersedeas*, the bond is fixed at the sum of \$2,000."

No bond was executed under the authority of this order, and, February 16, 1876, a petition for the allowance of an appeal from the orders and decrees of October 22d and January 14th, to operate as a *supersedeas*, was presented to Mr. Justice Miller, the justice of this court assigned to the eighth circuit, in which the district of Iowa is situated; and he allowed the appeal as prayed for, and accepted a *supersedeas* bond in the sum of \$20,000. In due time the transcript of the record was filed in this court and the appeal docketed. The Farmers' Loan and Trust Company, represented by a joint committee of the bondholders, now move, 1. To vacate the *supersedeas*; and 2. To dismiss the appeal.

§ 1493. *The power of a justice of this court to grant a supersedeas.*

1. As to the *supersedeas*.

In *Kitchen v. Randolph*, 3 Otto, 86, we held that it was not within the power of a justice of this court to grant a *supersedeas* on a writ of error or upon an appeal, unless the writ of error was sued out and served or the appeal taken within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of. The decree in this case was rendered October 22, 1875. At that time the present appellants were not parties to the suit, and consequently could not appeal. The application of December 16th, though made in their interest, was in form by the Farmers' Loan and Trust Company. This application was denied; and properly so, because an appeal was only asked so far as it affected the interests of these appellants. The trustee represents all the bondholders; and as the decree is indivisible, it must appeal for the whole, or none. No application was then made by the appellants for leave to intervene and become parties, and consequently the court could not then have been asked to allow them an appeal as parties. Such an application was, however, made January 11th; and January 14th they were admitted as parties for the purpose of appealing. An appeal was then allowed to them; but they did not avail themselves of it, either by giving a *supersedeas* bond or a bond for costs. And if they had done so, it could not have had the effect of a *supersedeas*, because it was not allowed until after the expiration of the sixty days. The order of the court, to the effect that if the bond should be given the appeal might be regarded as taken and perfected December 16th, was of no effect for the purposes of a *supersedeas*.

§ 1494. *Power of a court to make a nunc pro tunc order.*

While it is true that the court may enter an order in a cause *nunc pro tunc*, where the action asked for has been delayed by or for the convenience of the court (*Perry v. Wilson*, 7 Mass., 394), it is never done where the parties themselves have been at fault (*Fishmongers' Company v. Robertson*, 3 Man., Gr. & S., 974), or where it will work injustice.

§ 1495. *To make a nunc pro tunc order for a supersedeas effectual, it must appear that the delay was caused by the court, and that no injustice was done.*

A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with.

Hogan v. Ross, 11 How., 297; Railroad Co. v. Harris, 7 Wall., 575. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done. A slight examination of the facts in this case will be sufficient to show that the failure to take this appeal in time is attributable entirely to the parties. They knew, more than twenty days previous to the entry of the decree, that there was a conflict of interest between them and a large majority of the bondholders, and that the trustee had been asked to have a decree entered such as those opposed to them desired. Instead of seeking to be made parties to the suit at that time, or during the first eleven days of the term and before the decree was entered, they contented themselves with a notice to the trustee and a demand upon it to procure such a decree as they required, and, if that could not be done, to appeal. This, too, when they knew that they had only \$200,000 out of \$3,700,000 of the secured bonds. After the decree was entered, they delayed any application to the court for leave to intervene for the protection of their own interest until after an adjournment to a remote day had taken place. Then, delaying until near the expiration of the sixty days, they caused the trustee to apply for leave to appeal, so far as their interests were affected, when it must have been apparent that such an order could not have been made. Even then they filed no application to be made parties so that they might appeal for themselves, but delayed all action in that behalf until long after the time when a *supersedeas* could be had as a matter of right. All this was the act of the parties, and not of the court.

§ 1496. *A decree is not suspended by a motion to set it aside made by persons not parties to the suit.*

It is claimed, however, that the motion filed by the appellants January 13th to set aside the decree operated to suspend the decree, and that under the authority of Brockett v. Brockett, 2 How., 238, they had until sixty days after their motion was denied to perfect an appeal and obtain a *supersedeas*. But there is an essential difference between that case and this. In that, the motion was made by parties to the suit. The motion was one that could be made without leave, and it was entertained. The cause was referred to a master upon this motion. Under such circumstances, the court held that the decree did not become final until the motion for rehearing was decided. Here, however, the movers were not parties to the suit. They had no right to intervene except upon leave, and this was refused. Under such circumstances, it is clear that the decree was not suspended in whole or in part by their motion. The appellants were permitted to intervene, but only for the purpose of an appeal. It would have been within the power of the court to set aside the old decree and enter it over again, but this was refused. Leave only was granted to appeal from the decree as originally rendered. No *supersedeas* can follow from the appeal allowed by Mr. Justice Miller, because that clearly took effect after

the expiration of the sixty days from the date of the decree. Neither can the order of the same justice have the effect of the allowance of a *supersedeas* on the original appeal, because, as has already been shown, that appeal was not taken in time. From this it follows that the motion to vacate the *supersedeas* must be granted.

§ 1497. *Persons may be permitted to become parties to a suit for the purpose of taking an appeal.*

2. As to the appeal.

The appellants, by the order of January 14th, became parties to the suit for the purposes of an appeal. This order, having been made at the same term in which the decree was entered, was within the power of the court, and although it does not appear whether they were admitted as plaintiffs or defendants, it was sufficient to enable them to prosecute an appeal for the protection of their interests. Under this authority their appeal has been allowed and perfected. Whether this brings up the whole of the case, or only a part, it is not necessary now to consider. It is clear that these parties have been allowed their appeal and that the case is here to the extent that is necessary for the protection of their interests. It is their separate appeal within the rule as to the form in which a severance may be obtained, which is laid down in *Masterson v. Herndon*, 10 Wall., 416. The motion to dismiss the appeal is, therefore, denied.

§ 1498. *Where private interests only are involved causes will not be advanced on the docket.*

Both the appellants and the appellees ask to have the cause advanced for a hearing, but as only private interests are involved we see no reason why it should have preference over other suits upon the docket. This motion also is denied.

Dissenting opinion by MR. JUSTICE MILLER, MR. JUSTICE FIELD concurring.

I dissent from this opinion. I think the circuit court, under the circumstances of the case, had a right to treat the application of appellants for appeal as having been made when they asked liberty to use the name of their trustee for that purpose, and it was rightfully allowed by the circuit court as of that date. If this be so, it is not denied that the bond approved by me would operate as a *supersedeas*.

WURTS v. HOAGLAND — IRON COMPANY v. HOAGLAND.

(15 Otto, 701-703. 1881.)

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—The controversy in these cases arose out of an assessment of benefits for the drainage of lands in New Jersey. It was decided by the supreme court of that state, December 1, 1880. The court of errors and appeals affirmed the judgment on the 18th of July, 1881, and the record was remitted August 31, 1881. On receiving the *remittitur* on that day, the supreme court entered a rule ordering it to be filed and the cause to be proceeded with according to law. Writs of error from this court to the supreme court of New Jersey were allowed and bonds approved October 27, 1881, and on the following day were filed in the clerk's office of the latter court. The writs of error were properly directed to the supreme court, because at that time the record had been transmitted to it, and was then in its possession. See *Atherton v. Fowler*, 91 U. S., 143, 148. But at any time before the *remittitur* the writs

might have been directed to the court of errors and appeals, because the judgment of that court was the final judgment in the cause, and until the *remittitur* was made it had possession of the record in contemplation of law. It is that judgment which is the subject of revision here. The plaintiff in error insists that the action of the supreme court, on receiving the *remittitur*, was the final judgment. But this is not correct. Such action was not necessary to the jurisdiction of this court. A number of instances might be cited in which, without any *remittitur*, a writ of error from this court has been directed to the court of errors and appeals of New Jersey. This was the course in the noted cases of *State of New Jersey v. Wilson*, 7 Cranch, 164; *Bridge Proprietors v. Hoboken Company*, 1 Wall., 116, and *New Jersey v. Yard*, 95 U. S., 104.

§ 1499. *In order that a writ of error shall operate as a supersedeas it must be issued within sixty days after the final judgment is rendered.*

In those states where the highest court does not have possession of the record, and does not render a judgment, but decides questions certified by the inferior courts, and merely issues a rescript directing the latter what judgment to render, the case would perhaps be different. But in New Jersey the record itself, or a transcript which stands for the record, is removed to the court of errors and appeals, and a regular judgment is there rendered. For certain purposes, as in England on writs of error from the house of lords, the judgment of the inferior court pending proceeding in error is supposed to be in existence. Action upon it may be brought, and, on failure to give proper bail in error, execution may be issued. But for all other purposes, when a writ of error goes to an inferior court, the court of errors and appeals obtains possession of the cause and renders a formal judgment therein. If the judgment of the inferior court is reversed, the court of errors usually renders such judgment as ought to have been rendered, though it has the power to direct the court below what judgment to give. It is only necessary to open a book of New Jersey reports, containing decisions of the highest court, to ascertain its jurisdiction in this behalf. Thus, in 2 Zabriskie, 623, is a judgment in the case of *Demarest v. Hopper*, reversing the judgment of the supreme court in an action of ejectment, and rendering judgment for the plaintiff; and in the same book, p. 725, is another judgment of reversal in the case of *Hopper v. Hopper*, coupled with a judgment for the demandant in an action of dower, with a direction to the supreme court to award a writ of inquiry to assess the damages, and to issue execution therefor.

We think that the final judgment in these cases was rendered on the 18th day of July, 1881, being the judgment rendered by the court of errors and appeals; and that as the writs of error were not issued and served until the 28th of October, more than sixty days thereafter, they were too late to operate as a *supersedeas*. The rules to show cause must therefore be discharged.

TIERNAN v. BOOTH.

(Circuit Court for Illinois: 9 Bissell, 499-502. 1880.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—In this case a judgment was rendered by this court in favor of the plaintiff in an action of ejectment, on the 13th day of December, 1879, and within the proper time a bond was filed by the defendant, with security approved by the court, in an amount sufficient to make it a *supersedeas*. A writ of error was seasonably sued out, and a copy was also left in the clerk's office for the opposite party, in conformity with the statute. In all respects,

therefore, the necessary steps were taken by the defendant to make the writ of error a *supersedeas*, unless one is lacking, viz.: because the citation was not signed by the judge until the 4th day of September, A. D. 1880.

§ 1500. *A writ of error duly sued out of the circuit court becomes a supersedeas, and no order of court is necessary to make it operative as such.*

The practice does not seem to be uniform in the various circuit courts of the United States as to the manner of making a writ of error a *supersedeas* by the action of the court. It seems to be conceded that it is not necessary, provided everything has been done required by the statute, for a court or the judge to make an order that the writ of error be a *supersedeas*. It becomes so *per se* upon compliance with the statute. The practice in this circuit has usually been upon the execution and approval of a sufficient bond, and the issue of the citation, to treat a writ of error as a *supersedeas* without any express order of the court or judge. It is generally understood between parties and by the court that the bond that is offered, being sufficient in amount, and the security adequate, is intended and does operate as a *supersedeas*. If that is so understood by the counsel and the court, no application is made for an execution or a writ of possession, as the case may be; and therefore no order is generally entered in such cases. At the same time the practice has been occasionally for counsel to ask that a special order shall be entered by the court or judge declaring the writ of error a *supersedeas*, and when so desired the order has been made. The language of the statute is (section 1000), "every justice or judge signing a citation on any writ of error shall . . . take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect." Undoubtedly the general rule is that the signing the citation and taking the security are simultaneous acts. The statute seems to imply that they are, and to impose as a duty on the judge when he signs the citation, that he shall then take good and sufficient security. In practice the citation is usually prepared by the counsel and presented to the judge for his signature. In fact it may be stated, I think, that this is the universal practice. In consequence of this, and because no citation was presented to the judge for signature, none was signed in this case, and it was not until the 4th day of September, 1880, when it was ascertained that no citation had ever been actually signed or served, that the citation was presented to the judge for his signature, which was then affixed. The writ of error was returnable to the first day of the present October term, and the citation was issued and served on the plaintiff to appear on the first day of the October term of the supreme court for this year, to answer the writ of error.

§ 1501. *The omission of a citation within sixty days after a writ of error has been sued out will not entitle a party to a writ of possession.*

It will be seen from this statement that if the plaintiff is entitled to a writ of possession in this case, it will be in consequence of the technicality of a citation not having been prepared and presented to the judge and signed within sixty days after the judgment was entered. I do not feel inclined to sustain a technicality of this kind under the facts of this case. Undoubtedly it is competent for the supreme court to grant a *supersedeas* even where none has been allowed by the circuit court. But here all that was necessary to make the *supersedeas* effectual was the citation and the signature of the judge, within sixty days after the judgment was rendered. It seems to me, for all practical purposes, the plaintiff having been served with a citation before the October term of the supreme court, and notice thus being brought home to him of the writ

of error and of the term to which it was returnable, and a bond having been executed, which was treated by the court as a *supersedeas* bond, it is sufficient to entitle the defendant to take the judgment of the supreme court upon the merits of the case itself before the plaintiff can call on this court for a writ of possession. At any rate, if it be a matter of doubt, I prefer to take this view of the case in order that the plaintiff may avail himself of any error, if any has been committed by this court, and take the opinion of the supreme court upon the question. If that court, upon proper application, shall be of opinion that, under the facts in this case, the plaintiff is entitled to a writ of possession, this court will follow that ruling without any order being made, upon being so informed.

KITCHEN v. RANDOLPH.

(3 Otto, 86-92. 1876.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The only question presented by this motion is as to the power of a justice of this court to allow a *supersedeas* in cases where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of.

§ 1502. *Statutes and decisions reviewed on the subject of supersedeas.*

The judiciary act of 1789 (1 Stat., 84, sec. 22) made provision for a review by this court of judgments and decrees in civil actions and suits in equity in the circuit courts upon writs of error accompanied by a citation to the adverse party, "signed by a judge of such circuit court or justice of the supreme court." By the same section it was further provided that "every justice or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good." The citation was essential to the validity of the writ, and without it the writ would be quashed. *Lloyd v. Alexander*, 1 Cranch, 365. The writ brought up the record and the citation the parties. *Cohens v. Virginia*, 6 Wheat., 410; *Ather-ton v. Fowler*, 91 U. S., 146. As the security was to be given when the citation was signed, there could be no valid writ without the security.

At common law a writ of error was a *supersedeas* by implication. Bac. Abr., tit. *Supersedeas*, D, 4. To avoid the effect of this rule the act of 1789 (1 Stat., 85, sec. 23) provided that a writ of error "shall be a *supersedeas*, and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of;" and in cases where a writ of error might be a *supersedeas*, no execution could issue for ten days. Under this section it was held, in *Hogan v. Ross*, 11 How., 297, that there was no authority "to award a *supersedeas* to stay proceedings on the judgment of an inferior court upon the ground that a writ of error is pending, unless the writ was sued out within ten days after judgment and in conformity with the provisions of the" act; and in *Railroad Co. v. Harris*, 7 Wall., 575, that the effect of the writ as a *supersedeas* "depends upon compliance with the conditions imposed by the act," and that "we cannot dispense with that compliance in respect to lodging a copy for the adverse party." The stay of proceedings followed as a matter of right from the issue and service of the writ of error, in the manner and within the time prescribed

by the act. No special directions as to the security were necessary, because, under the law as it originally stood, security must be given in all cases when the writ was issued, that the plaintiff in error would prosecute his writ to effect and answer all damages and costs if he failed to make his plea good. It soon became manifest, however, that, in cases where there was to be no *supersedeas*, security to this extent was unnecessary; and, consequently, in 1794, it was enacted (1 Stat., 404) "that the security to be required and taken on the signing of a citation on any writ of error, which shall not be a *supersedeas* and stay execution, shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error." After this the form of the security became material, and the *supersedeas* was made to depend upon the condition of the bond executed at the time of the signing of the citation as well as upon the prompt issue and service of the writ. *Rubber Co. v. Goodyear*, 6 Wall., 156; *Slaughter-house Cases*, 10 Wall., 289, 291.

In 1803 appeals were granted in cases of equity and of admiralty and maritime jurisdiction, and made "subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error." 2 Stat., 244, sec. 2. It has accordingly been held that an appeal to operate as a *supersedeas* must be perfected and the security given within ten days after the rendition of the decree. *Adams v. Law*, 16 How., 148; *Hudgins v. Kemp*, 18 id., 535; *French v. Shoemaker*, 12 Wall., 100; *Bigler v. Walker*, id., 149. The allowance of the appeal is the equivalent of the writ of error.

It thus appears that under the statutes which regulated the early practice, a *supersedeas* could not be obtained except by prompt action and strict compliance with all the requirements of the law. Parties were, however, not unfrequently put to serious inconvenience by so stringent a rule; and, to avoid this, it was enacted in 1872 (17 Stat., 198, sec. 11), "that any party or person desiring to have any judgment, decree or order of any district or circuit court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree or order, or afterward, with the permission of a justice or judge of the appellate court." In *Telegraph Company v. Eyser*, 19 Wall., 419, we held, in reference to this statute, that where an appeal was taken and the requisite security given after the expiration of ten days, but within sixty, a *supersedeas* followed as a matter of right. In the course of the opinion in that case it was said: "It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. . . . The execution, approval and filing of the bond are substantial. The filing of the writ is matter of form." In *Board of Commissioners v. Gorman*, 19 Wall., 661, decided at the same term, we further held that execution might issue after the expiration of ten days, if a *supersedeas* had not been obtained; but, if one should issue, and a *supersedeas* be thereafter perfected, that would only operate

to stay further proceedings under the execution, and could not interfere with what had already been done.

In this condition of the law the Revised Statutes were adopted, and sec. 1007 is as follows: "In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward, with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, execution shall not issue until the expiration of the said term of sixty days."

At the next session of congress, an amendment to this section was passed, limiting the time for withholding execution to ten days. 18 Stat., 318. By sec. 1012, Rev. Stat., that part of the act of 1803 (2 Stat., 244) which placed appeals on the same footing as writs of error was re-enacted, and, by sec. 1000, provision was made for security for costs only in cases where no *supersedeas* was desired, thus reproducing the old law on that subject. It is evident that congress intended in this revision to change to some extent the law of 1872. The fair inference from the opinion in *Telegraph Company v. Eyser* is, that as that law "was silent as to the writ," and "it was not said when it must be served," a *supersedeas* could be obtained by the execution, approval and filing of the necessary security, even though the writ of error should not be served or the appeal taken until after the expiration of sixty days. In this way the old rule requiring promptness of action to obtain a stay of proceedings was substantially abandoned. A justice or judge could, in his discretion, grant the stay at any time, if the writ should be issued and served within the two years allowed for that purpose. The revised section is *not* "silent as to the writ," and it *is* "said when it must be served." If a *supersedeas* is asked for when the writ is obtained, the writ must be sued out and served within the sixty days, and the requisite bond executed when the citation is signed. The policy of the old law is thus restored, the only modification being in the extension of time allowed for action. Sixty days are given instead of ten. Had the section stopped here, a plaintiff in error or appellant would have been compelled to elect, when he sued out his writ of error, or took his appeal, whether he would have a *supersedeas* or not; because it is made one of the conditions of the stay of proceedings that the requisite security shall be given upon the issuing of the citation. Having once made his election, he would be concluded by what he had done. But congress, foreseeing undoubtedly that cases might arise in which serious loss would result from such a rule, went further, and, in a subsequent part of the section, provided that if a writ of error had been served, as required in the first paragraph, a stay might be had as a matter of right by giving the required security within sixty days, and afterwards, as a matter of favor, if permission could be obtained from the designated justice or judge. Thus prompt action in respect to the writ was required, and indulgence granted only as to the security.

§ 1503. *A supersedeas is not valid unless there has been a writ of error served or an appeal taken within sixty days after the rendition of the judgment.*

It is contended, however, that the words "having served his writ of error as aforesaid" as used in this part of the section, have reference to the manner of

service alone; that is to say, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, and not to the time, sixty days. But time is one of the necessary ingredients in the prescribed service to secure a *supersedeas* under the provisions of the first part of the section. It cannot be dispensed with there any more than it could have been under the act of 1789; and under that act, as has been seen, it was essential. In fact, it was the one thing upon which, more than all others, the relief sought for depended. Service "as aforesaid" must, therefore, mean such a service as would have perfected the stay, if the proper security had been given. Relief is extended only in respect to the security. What afterwards occurred is equally indicative of the intention of congress. As the section originally stood, no execution could issue, when the writ of error might be a *supersedeas*, until the expiration of sixty days, the time allowed for perfecting a *supersedeas* without leave. If the writ had been issued and served without the security required for a *supersedeas*, execution must still be withheld until the time had elapsed within which the further security might be given as a matter of right. This changed the law from what we held it to be in *Commissioners v. Gorman*, and at once, upon the discovery of the effect of what had been done, the amendment was adopted limiting the time to ten days, as it originally stood. Nothing was done, however, towards adapting the section as revised to the liberal construction of the act of 1872, indicated in *Telegraph Company v. Eyser*. (See §§ 1507, 1508.)

§ 1504. *A justice of the supreme court cannot grant a supersedeas unless the appeal is taken within sixty days.*

We are, therefore, of the opinion, that, under the law as it now stands, the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done. The appeal was taken in this case after the expiration of sixty days, and the motion to vacate the *supersedeas* must for that reason be granted.

Motion granted.

DOYLE v. WISCONSIN.

(4 Otto, 50-52. 1876.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The claim on the part of the plaintiff in error is that, as a writ of error to operate as a *supersedeas* might issue from this court to re-examine the judgment of the court below, a writ to carry the judgment into effect could not issue from the state court until the expiration of ten days after the rendition of the judgment. Whether this is so or not depends upon the effect to be given to that clause in sec. 1007, Revised Statutes, which, as amended by the act of February 18, 1875 (18 Stat., part 3, p. 316), reads as follows: "And in such cases, when a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days;" that is to say, until the expiration of ten days after the rendition of the judgment.

§ 1505. *The Revised Statutes are a revision and consolidation, and not an enactment.*

The writ of error was issued in this case under sec. 709 of the Revised Statutes, which is a reproduction of sec. 25 of the judiciary act of 1789 (1 Stat., 85), as amended before the revision. The part of sec. 1007 referred to is the re-

production of a similar provision in sec. 23 of the same act. The Revised Statutes are a revision and consolidation of the old statutes, rather than an enactment of new. 16 Stat., 96; 14 id., 75, sec. 2. Sec. 5600 provides that "the arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and, therefore, no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed." This makes it proper that we should look to the original act to ascertain the legislative intent in cases of doubt.

§ 1506. *The provision of the statute in relation to stay of execution does not apply to judgments and decrees of state courts.*

Going, then, to the old law, we find that sec. 22 relates entirely to writs of error for the review of judgments and decrees in the courts of the United States. Then follows sec. 23, which provides "that a writ of error as aforesaid," clearly referring to the writ provided for in the preceding section, "shall be a *supersedeas*, and stay execution in cases only where the writ of error is served . . . within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of the term of ten days, execution shall not issue in any case where a writ of error may be a *supersedeas*." Read in this connection, it is clear that the provision for delay of execution refers only to judgments and decrees in the courts of the United States. Sec. 25 then provides for writs of error to a state court, and adopts the regulations of sec. 22, as to the writ and proceedings under it, but omits entirely any direction as to delay of execution upon the judgment. From this we think it manifest that it was not the intention of congress, under the act of 1789, to interfere at all with the practice of the state courts as to executions upon their judgments, until a *supersedeas* was actually perfected, and that the same effect must be given to the corresponding sections of the revision. In *Board of Commissioners v. Gorman*, 19 Wall., 664, we held that if an execution was issued upon a judgment in the courts of the United States after the expiration of ten days, a *supersedeas* afterwards obtained would prevent further proceedings under the execution, but would not interfere with what had already been done. Applying this principle to the case in hand, it follows that, as the writ of *mandamus* was rightfully issued and served before the *supersedeas* was obtained, this motion must be denied.

TELEGRAPH COMPANY v. EYSER.

(19 Wallace, 419-433. 1873.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an application for a writ of *supersedeas* or an order to the supreme court of Colorado territory, and to the district court of the first judicial district in and for the county of Arapaho, in that territory, commanding that further proceedings upon the judgment in this case be stayed pending the writ of error whereby the judgment was brought into this court for review. The judgment was affirmed by the supreme court of the territory on the 6th of September, 1873. On the 8th of October following the defendant sued out a writ of error returnable to this court. It was duly served and returned. On the day last mentioned a citation was served on the adverse party, and a *supersedeas* bond in the sum of \$12,000, conditioned and approved according to law, was filed in the proper office. The plaintiffs in error repre-

sent in their petition that the defendant in error has applied to the supreme court of the territory for an order that execution issue on the judgment, notwithstanding the writ of error and the *supersedeas* bond, and that they are apprehensive such an order will be made. Hence this application here.

§ 1507. *What necessary to a supersedeas prior to the act of 1872.*

The twenty-third section of the judiciary act of 1789 declares "that a writ of error, as aforesaid, shall be a *supersedeas* and stay of execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the judgment remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of." The second section of the act of 1803 makes appeals "subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error." The twenty-second section of the act of 1789 requires "that every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Where the judgment or decree is for money, not otherwise secured, the bond "must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal." (Twenty-ninth Rule of this Court.) And such bond must be approved and filed within the ten days prescribed for the service of the writ of error. *Adams et al. v. Law*, 16 How., 144; *Hudgins v. Kemp*, 18 id., 533.

§ 1508. *What necessary to a supersedeas under the act of 1872. (a)*

Such was originally the state of the law upon this subject. It frequently subjected parties to great inconvenience and sometimes to serious injury. If the writ were not served and the bond given within ten days from the rendition of the judgment or decree, the defendant, if it were for money, was liable to be compelled to pay, although he might ultimately be victor in the litigation. In such case he would lie out of the use of his money in the meantime, and finally be compelled to take the chance of getting it back, perhaps by further litigation. The facts and the law might be for him and yet the money be lost. If real estate were involved, he was liable to be turned out of possession and to lose all benefit from the property during the same period. It was frequently impossible to serve the writ and give the bond within the ten days, though both might readily have been done if more time were allowed. The eleventh section of the act of June 1, 1872, was intended to remedy these evils. That section is as follows: "That any party or person, desiring to have any judgment, decree or order of any district or circuit court reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor within sixty days after the rendition of such judgment, decree or order, or afterward, with the permission of a justice or judge of the said appellate court." These provisions are remedial, and, therefore, to be construed liberally. So far as there is any conflict with the pre-existing rules, the latter must yield. The intention of the lawmaker constitutes the law. *United States v. Freeman*, 3 How., 565. What is clearly implied in a statute is as effectual as what is expressed. *United States v. Babbit*, 1 Black, 61. It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance

(a) See *Kitchen v. Randolph*, §§ 1502-1504.

must, of course, precede the execution of the bond; and as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before, or simultaneously with, the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. A construction which requires the service to be still within ten days from the rendering of the judgment is, we think, too narrow. It is sustained by no sufficient reason and would largely defeat the salutary purposes of the statute. The execution, approval and filing of the bond are substantial. The filing of the writ is matter of form. Form, under the circumstances, must not be allowed to defeat substance where the consequences would be of so serious a character. The application of the plaintiffs in error is founded upon this section. As we construe it, their case is within it. The order asked for will be directed to issue, unless this opinion shall render that procedure unnecessary.

MR. JUSTICE CLIFFORD rendered a dissenting opinion, MR. JUSTICE DAVIS concurring.

SILSBY v. FOOTE.

(20 Howard, 290-296. 1857.)

APPEAL from U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a motion to dismiss an appeal docketed as No. 106, on the ground that a previous appeal, docketed No. 54, had been taken by the same parties, and from the same portions of the decree below. The final decision had been made by the court between the parties on the coming in of the master's report on the 28th August, 1854, and an appeal duly taken on the 4th September following. The decree was special in its terms, and was not settled or signed by the judge till the 11th December, 1856, on which day the second appeal was taken. As the appellant desired to appeal within the ten days, so as to stay execution, the second appeal was taken for abundant caution, as there might be a doubt from which period the ten days should be counted, namely, the time of the final decision of the court or of the signing and filing of the special decree in form.

§ 1509. *An appeal, to stay execution, may be taken in ten days after judgment or decree pronounced, or from time of entry in form; it will operate as a supersedeas in either case.*

By the twenty-second section of the judiciary act, modified by the second section of the act of March 3, 1803, an appeal from a final decree must be taken within five years after the *rendering* or *passing* of the judgment or decree complained of. And by the twenty-third section, as modified above, the appeal is a *supersedeas*, and stays execution in cases only where it is taken and a copy lodged for the adverse party within ten days (Sundays exclusive) after *rendering* the judgment or *passing* the decree complained of. The *time* to be taken as when the judgment or decree may be said to be rendered or passed may admit of some latitude and may depend somewhat upon the usage and practice of the particular court. In the case of a simple judgment or decree, such as an affirmance or reversal and the like, there would seem to be no difficulty in taking the appeal at any time within ten days after the decision on the case was pronounced. But where the decree is special, and its terms to be settled, there is a propriety in waiting for its settlement before taking the ap-

peal. Whether taken or not, may sometimes depend upon the decree as settled. In the second circuit, with the practice of which I am the most familiar, it is supposed by many of the profession that the proper time for taking the appeal in such a case is after the settlement of the decree. As this court, however, has always held that if an appeal is taken in court at the time of rendering the decision, or during the term, no citation is necessary, and as appeals are, perhaps, more frequently taken within the ten days after the decision is pronounced and entered on the minutes by the clerk, it may be admitted that when thus taken it is regular, and stays execution in the court below. And we are also of opinion, that if taken within ten days after the decree is settled and signed by the judge and filed with the clerk, that it is in time to stay the proceedings. The recognition of the two periods from which the ten days may be counted becomes necessary, on account of the difference in the modes of proceeding and practice in the different circuits. This question cannot arise in England, as the time for appeal runs two years from the enrollment of the decree. 3 Dan. Pr., 131. The time of enrollment cannot well be adopted by this court, as on many of the circuits it is understood, according to the practice, no enrollment of the decree takes place.

§ 1510. *Where an appeal was taken within ten days from the rendering of the decision, a second one taken after the decree was settled and entered was dismissed.*

As, upon our view of the case, presented on the motion, the first appeal was regular, the one taken and standing on the docket No. 106 should be dismissed.

GREEN v. VAN BUSKERK.

(3 Wallace, 448-451. 1865.)

ERROR to the Supreme Court of New York.

STATEMENT OF FACTS.—Motion to stay proceedings in the lower court. A judgment of the supreme court of New York was affirmed in the court of appeals, and the record was sent down with an order to enter judgment. The judgment was entered and a writ of error sued out, after which execution was issued.

§ 1511. *A judgment is not final until entered in a court from which execution can issue.*

Opinion by CHASE, C. J.

We have already held, at this term, in a case from Massachusetts, that when the supreme court renders final judgment, and sends the judgment to a court below for execution, and with the judgment the record, a writ of error to review the judgment may be issued to the latter court. In that case, it is true, no question was made in respect to the operation of the writ as a *supersedeas*; but we think that the true construction of the act of congress requires us to hold that a judgment cannot be regarded as final, in the sense of the act, until entered in a court from which execution can issue.

§ 1512. *A party has ten days within which to sue out a writ of error after entering judgment in the lower court pursuant to an affirmance in the appellate court.*

In the case now before us, the record was sent by the court of appeals to the supreme court, and the judgment was entered in the latter court in conformity with the direction of the former. This was, it is true, the judgment of the court of appeals as well as the judgment of the supreme court; but it became

a final judgment, on which execution could issue, only when entered on the 16th February, 1866, in the supreme court, to which the record was returned, and where it remained. The unsuccessful party had ten days from that entry to take out a writ of error and make it a *supersedeas*; and he duly availed himself of this right by service of the writ of error on the 20th February, 1866, and giving the required bonds. The direction to issue execution was given under a mistaken construction of the act; and its issue makes it necessary that a writ to stay the proceedings be sent from this court.

Motion allowed.

BROCKETT v. BROCKETT.

(2 Howard, 238-241. 1844.)

APPEAL from the Circuit Court for the District of Columbia.

§ 1513. *An appeal bond need not be signed by all the defendants.*

Opinion by MR. JUSTICE STORY.

A motion has been made to dismiss this appeal upon several grounds. The first is, that although all the defendants have appealed from the decree of the court below, yet a part of them, only, have signed the appeal bond. This objection is not maintainable. It is not necessary that all the defendants should join in the appeal bond, although all must join in the appeal. It is sufficient if the appeal bond is approved by the court as satisfactory and complete security, by whomsoever it may be executed.

§ 1514. *An appeal does not lie from refusal to open a former decree.*

The next ground is, that an appeal has been taken from the refusal of the court below to open the former decree, rendered for the appellant. It is plain that no appeal lies to this court in such a matter, as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed.

§ 1515. *An appeal will operate as a supersedeas if taken within ten days after a petition to open the final decree is overruled.*

But an appeal has also been taken to the first decree (which was a final decree) rendered by the court. That decree was rendered on the 10th of May, 1843. During the same term, a petition was filed by the defendants on the 26th day of the same month, to have the final decree opened for certain purposes; and the court took cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing, and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond. Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a *supersedeas*, or to stay execution on the decree; because, to have such an effect, the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given within ten days from this last period.

§ 1516. *Citation not necessary where appeal is taken in open court.*

Another and the last ground of exception is to the want of proper parties to the writ of error and citation. No writ of error lies in this case, but an appeal only; and the appeal having been made in open court, no citation was necessary.

Upon the whole, we are of opinion that the motion to dismiss the appeal ought to be overruled, and it is accordingly overruled.

CARR v. HOXIE.

(13 Peters, 460-462. 1839.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an appeal from a decree in equity of the circuit court for the district of Rhode Island, made in a case where the appellant was the original defendant. The facts, so far as they are now before us upon the present record and appeal, are briefly these: The original decree was made at the June term of the circuit court, 1834; and at the same term an appeal was taken therefrom to the supreme court. The appeal was entered at January term, 1835, of the supreme court, and was dismissed for want of due prosecution, at January term, 1837. At the November term of the circuit court, 1837, a petition was filed by the original appellant, praying for a new and second appeal from the original decree; which was granted by the court, upon bonds being given according to law. At the same term, the original plaintiff prayed for further proceedings to enforce the original decree, whereupon a supplemental decree was passed by the court for a sale of the premises in controversy, pursuant to the original decree; and from this last decree the original appellant also claimed an appeal, which was granted by the court upon his giving bonds; and the case now comes before us solely upon this last appeal, the record and proceedings in the original suit not having as yet been brought up and filed in the court, in pursuance of the second appeal from the original decree already referred to.

§ 1517. *Where an appeal is dismissed for want of prosecution, a second appeal will not operate as a supersedeas. (a)*

The question, therefore, whether this second appeal lies to this court, after the dismissal of the former appeal, is not now before us, and can only arise when the original proceedings come before us, upon a due prosecution and entry of the second appeal. The only question now before us is, whether this second appeal is, under the circumstances, a *supersedeas* to all further proceedings in the circuit court to execute the original decree. If it is, then the appeal from the supplemental decree of sale is maintainable; otherwise it ought to be dismissed. Upon full consideration, we are of opinion that it is no *supersedeas*; that the circuit court is at full liberty, in its discretion, to proceed to execute the original decree, if it shall deem it advisable; and that the supplemental decree of sale is but a decree in execution of the original decree; and not a final decree in the contemplation of the acts of congress, from which an appeal like that now before us lies. It must therefore be dismissed with costs. But in order to guard against any misapprehension, it is proper to add, that this dismissal is in no sense to be construed to prevent the original proceedings and decree from being brought before this court upon the second appeal taken thereto in the circuit court, for full consideration, whether it lies or not.

(a) Although a first writ of error is a *supersedeas*, if it be dismissed, a second writ sued out more than ten days after the entry of judgment will not operate as a *supersedeas*, and in such case the supreme court has no power to award one. *Hogan v. Ross*,* 11 How., 294.

GODDARD v. ORDWAY.

(4 Otto, 672, 673. 1876.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.— This was a suit in equity prosecuted by the appellant to subject to the payment of a debt a portion of the profits, as they accrued to the defendant in the performance of a contract between himself and the United States. In the progress of the cause in the court below a receiver was appointed to collect from the United States a part of the moneys payable to the defendant under his contract, as they fell due, and retain them to await the result of the suit. Upon the final hearing below the bill was dismissed, and from that decree this appeal, which operates as a *supersedeas*, was taken. When the *supersedeas* was perfected, the receiver had in his hands about \$25,000, invested in United States bonds, which he had collected under the order of the court and held subject to its disposal. The appellant fearing, as he alleges, that an order is about to be made directing the receiver to pay the money in his hands to the defendant, notwithstanding the appeal, asks the interference of this court for his protection.

§ 1518. *The lower court may, notwithstanding a supersedeas, give its receiver the necessary orders for the preservation of the property.*

A *supersedeas* upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. When this appeal was taken, the only execution there could be of the decree below was the collection of the cost and the delivery to the defendant of the fund in court, which is the subject matter of the litigation. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction.

§ 1519. *In case of a supersedeas, the lower court will be restrained from executing the decree.*

A *supersedeas* is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the *supersedeas*, we may, under sec. 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be “a writ necessary for the exercise of our jurisdiction.” The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise. In this case a rule has been already entered and served upon the court below and its receiver, restraining them from paying over any portion of the fund to the defendant until the further order of this court. That rule is now in force, and we suppose no further writ will be necessary to give it effect.

Motion denied.

BOARD OF COMMISSIONERS *v.* GORMAN.

(19 Wallace, 661-665. 1873.)

ERROR to the Supreme Court of the Territory of Idaho.

STATEMENT OF FACTS.—This was an application to restore Davis to an office from which he had been removed, as was alleged, under a writ issued after a writ of error had been sued out which, it was claimed, operated as a *supersedeas*. Further facts are stated in the opinion.

§ 1520. *The filing of a bond within sixty days stays further proceedings.*

Opinion by WAITE, C. J.

In order that a writ of error may operate as a *supersedeas*, it is necessary that a copy of the writ should be lodged for the adverse party in the clerk's office where the record remains, and that the bond approved by the judge allowing the writ should also be filed there. *O'Dowd v. Russell*, 14 Wall., 405. Execution cannot issue upon the judgment until the expiration of ten days, exclusive of Sundays, from the entry thereof. If the writ of error and bond are filed before the expiration of the ten days, no execution can issue so long as the case in error remains undisposed of. After the expiration of the ten days an execution may issue. Notwithstanding this, under the provisions of the act of 1872 (17 Stats. at Large, 198, § 11), upon the filing of the bond within sixty days from the time of the entry of the judgment a *supersedeas* may be obtained. Such a *supersedeas*, however, stays proceedings only from the filing of the bond. It prevents further proceeding under an execution which has been issued, but does not interfere with what has already been done.

FURTHER STATEMENT OF FACTS.—In this case the record shows that the judgment was actually entered on the 20th day of January. The entry as made was read in court on the morning of the 21st and the record signed by the judges, but it was ordered to be made on the 20th. The ten days, exclusive of Sundays, prescribed by the act of congress for delay of execution, expired on Saturday, the 31st of January. On Monday, the 2d of February, a majority of the judges of the court directed the clerk to issue a writ of restitution to carry the judgment into effect. On the same day the chief justice of the court allowed a writ of error and signed the necessary citation. A copy of the writ of error was filed in the clerk's office, and the writ and citation actually served upon the defendant in error before the clerk had completed the preparation of the writ of restitution. After he had completed its preparation he handed it to the attorney for the defendant in error, who had previously been served with the citation. No *supersedeas* bond was filed with the clerk on the 2d, and no notice was given that any had been approved. On the morning of the 3d of February the writ of restitution was served and Davis removed from his office. After this, and on the same day, a bond approved by the chief justice was left in the clerk's office by him. It nowhere appears from the record when this bond was approved. It bears date the 2d of February, but there is no certificate of the time when the approval was entered. It is certain, however, that it was not filed in the clerk's office until after service of the writ of restitution. The writ of error operated as a *supersedeas* only from such filing. That was too late to prevent the removal of Davis from his office in pursuance of the authority of the judgment; and we cannot now order him to be restored.

§ 1521. *The time within which the bond must be filed dates from the announcement of the decision.*

It is claimed, however, that as the record of the judgment was not signed by

the judges of the court until the 21st, the ten days did not commence to run until that date, and we are referred to the case of *Silsby v. Foote*, 20 How., 290, as establishing such a rule. (a) In that case the decision was actually rendered on the 28th August, but the decree was special in its terms, and was not settled or signed by the judge until the 11th December. Before any entry could be made it was necessary that the judge should pass upon its form. It was, therefore, quite right to delay the appeal until the exact character of the decree could be known. Here, however, the form of the judgment was settled upon the announcement of the decision, and it was entered accordingly. But the writ of restitution was not served until after the expiration of ten days from the 21st, and it does not appear that it was actually delivered to the sheriff for service before that time. There is nothing to prevent the preparation by the clerk of an execution before the expiration of the ten days. It cannot be issued before, and it is not issued until it is placed beyond the control of the clerk himself. So long as it remains with him, or under his control, it is like any other paper in his office. We think the motion must be denied, and in accordance with the request of the parties made at the argument, the case is dismissed.

SALTMARSH v. TUTHILL.

(12 Howard, 387-389. 1851.)

§ 1522. *A bond given on an appeal in a common law proceeding will not operate as a supersedeas.*

Opinion by TANEY, C. J.

The judgment in this case being in a common law proceeding, it was not removed to this court by the appeal; and, consequently, the appeal bond did not operate as a *supersedeas*.

§ 1523. *A writ of error bond will not operate as a supersedeas unless the writ be sued out within ten days from the rendition of the judgment.*

The writ of error afterwards sued out has brought the case regularly before this court. But as it was not sued out within ten days after the rendition of the judgment, the writ of error bond does not stay the execution under the act of 1789. 1 Stats. at Large, 73.

§ 1524. *The circuit court cannot stay execution on account of a mistake as to the time or manner of removing the cause.*

Nor is there any equitable power in the circuit court to stay the execution, upon the ground that a mistake as to the manner or time of removing the case was committed. And it is immaterial in this respect whether it was the mistake of the party or the court. For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of congress regulating appeals and writs of error, upon any equitable ground. No such power is given to them by law. It was so decided in this court in *United States v. Curry and others*, 6 How., 113, and *Hogan and others v. Ross*, 11 id., 297. The circuit court, therefore, erred in setting aside the execution which the plaintiff had issued on the judgment.

But we do not think it necessary at this time to determine whether this court has the power to issue the *mandamus* requiring the circuit court to issue the execution. Because we are satisfied from the facts before us, that the circuit court, without any coercive process, will conform to the opinion of this court,

(a) See §§ 1509, 1510, *supra*.

and issue execution when informed of this decision. The question, therefore, as to the power of this court to issue the *mandamus*, is, for the present, reserved.

ADAMS v. LAW.

(16 Howard, 144-149. 1853.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal in chancery from the decree of the circuit court for the District of Columbia.

A motion is made by the appellant's counsel for a *supersedeas*, on the ground that the hearing of the case in the circuit court was brought on irregularly, and the decree entered in the absence of the principal counsel for the defendants below; that by reason of this an appeal bond was not filed within ten days from the allowance of the appeal. Mr. May, who makes this motion, states that he is the administrator of the estate of Thomas and Edmund Law, children of John Law, who in their life-time were parties to the suit; and that he intended to appeal from the decree of the circuit court, if against him; that he had no notice of the cause being set for hearing; that he left the United States on public business, and was absent several months; that on his return he learned that a final decree had been entered against him, and that he had authorized no one to consent to the hearing of the cause out of its regular course. It appears that two other counsel who appeared for other defendants, consented to the hearing in order that the cause might be taken to the supreme court for ultimate decision; and these counsel understood the cause was to be appealed to the supreme court by consent, and that security for the money decreed to be paid would not be required. But both of these gentlemen state that, in giving their assent to the hearing, they did not represent Mr. May, not being authorized to do so. The suit in the circuit court was entitled: "Joseph E. Law by his next friend, Mary Robinson, v. Thomas Law and others, and James Adams, executor of Thomas Law." The controversy arose under the will of Thomas Law, deceased, and among other things the court decreed that James Adams, the trustee in the cause, who had sold certain property under the order of the court and had the proceeds in his hands, exceeding the sum of \$61,000, should pay over the money to the persons named in the decree as entitled to the same. This decree was entered the 18th day of December, 1852, and an appeal to the supreme court of the United States was prayed on the same day. An appeal bond, in the sum of \$200, was filed the 9th of December, 1853.

§ 1525. *An appeal will not operate as a supersedeas unless an appeal bond be given.*

The twenty-third section of the act of 1789 provides "that a writ of error shall be a *supersedeas* and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of, until the expiration of which term of ten days the execution shall not issue in any case where a writ of error may be a *supersedeas*. By the second section of the act of March 3, 1803 (1 Stats. at Large, 244), appeals are declared to be "subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error." Under this provision an appeal in chancery must be perfected by giving an appeal bond within the ten days, to act as a *supersedeas*. In *Wallen v. Williams*, 7 Cranch, 278, the court refused to quash an execution issued by

the court below to enforce its decree, pending a writ of error, as the writ was not a *supersedeas* to the decree. In *The Dos Hermanos*, 10 Wheat., 311, where the appeal was prayed within the five years' limitation, the appeal bond, being accepted by the court after that period, was held good, as having relation to the time of the appeal. "The mode of taking security and the time of perfecting it," the court say, "are matters of discretion, to be regulated by the court." But this cannot apply to a case where the appeal operates as a *supersedeas*. It must be brought strictly within the provisions of the law.

§ 1526. *An appeal must be perfected within ten days after decree, to operate as a supersedeas.*

The appeal, in this case, was prayed on the same day the decree was entered; but the bond was not given until nearly a year afterwards. The appeal must be perfected within the ten days after the decree was entered, to operate as a *supersedeas*. To supersede a judgment at law, the writ of error must be filed and bond given within the ten days. And the same rule is applied by the act of 1803 to appeals in chancery. The case of *Hardeman and Perkins v. Anderson*, 4 How., 642, is relied on as an authority under which a *supersedeas* may be issued in this case. In that case, it appeared from the record that the writ of error was issued and bond given within ten days after the judgment, and that the clerk of the district court promised to transmit the record to the supreme court. It was transmitted, but by some delay was not received until a few days after the adjournment of the court at the ensuing term. Before the adjournment, a certificate of the judgment having been obtained by the plaintiff's counsel in the judgment, on motion the cause was, under the rule of the court, docketed and dismissed. At the next term, on motion sustained by an affidavit, showing that the defendant in the judgment had not been negligent in the cause, it was ordered to be docketed, and a writ of *supersedeas* was issued, not on the second writ of error which had been issued, but to give effect to the first writ. After the dismissal of the cause at the previous term, execution was issued on the judgment, and it was necessary, after the cause was entered upon the docket, to supersede that execution.

It does not appear, from the facts in the case now before us, that it can be brought within any decision of this court. Whatever may have been the understanding of the counsel who appeared in the defense in the circuit court, as to an appeal of the case to the supreme court by consent and without security, it is not made to appear that the counsel of the complainants assented to such an arrangement. By the order of the circuit court, a copy of the decree was served on James Adams, the trustee; and also a rule to show cause why an attachment should not issue against him for not paying over to the parties the sums of money as required by the decree. His answer to the rule was filed, and, a motion being made for an attachment, it was taken under consideration and has not yet been decided. This court cannot presume that the circuit court, in the exercise of their discretion, will take any step in regard to the decree which shall place the fund at hazard or beyond the exercise of the appellate powers of this court. The motion for a *supersedeas*, by the counsel for the plaintiffs in error, is overruled. The court also overrule, under the circumstances, the motion of the defendant's counsel in error for a *procedendo*.

§ 1527. *It is sufficient if the record shows that the appeal was taken by the defendants, although they are not named.*

A motion is also made by defendant's counsel to dismiss the appeal on the ground "that there is no case as entitled on the record; and that the real par-

ties interested in the case, of which a record is filed, are not made parties to the appeal." After the decree was pronounced in the circuit court, the record states: "From which decree an appeal was prayed to the supreme court of the United States on the 18th December, 1852, and to them it was granted." The word "defendants" is omitted in this prayer, but that must have been a clerical omission, as it appears the appeal was "granted to them," that is, to the defendants. The title of the case, if incorrectly entered on the docket of this court, may and should be corrected by the record filed. There is nothing in the record to show that the appeal by the defendants was not prayed by all of them. The motion to dismiss is therefore overruled.

RAILROAD COMPANY *v.* SCHUTTE.

(10 Otto, 644-648. 1879.)

APPEAL from U. S. Circuit Court, Northern District of Florida.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—In this case the appellees have moved, 1. To vacate the *supersedeas*, because the approval of the *supersedeas* bond by the justice of this court who allowed the appeal was obtained by fraud and perjury; and 2. To dismiss the appeal, because the transcript of the record which has been filed in this court is not complete and is not properly certified. The appellants also have moved for leave to file a new bond in case the old one shall be set aside.

1. As to the vacation of the *supersedeas*. That the approval of the bond was brought about by gross fraud and perjury is so conclusively shown that no attempt has been made to deny it. The evidence also shows with equal certainty that the bond was obtained in the most irregular way. A lawyer, who, to say the least, was an entire stranger to all the parties in interest, was employed to procure, within thirty-six or forty-eight hours, sureties for the appellants sufficient to secure the payment of \$100,000. He was to be paid for his services six bonds of \$1,000 each of the Florida Central Railroad Company, the appellant corporation, which were then of no marketable value. In due time he produced the requisite number of persons to sign as sureties. When they came the "usual form of justification of about four lines in length" was "ignored," and a full affidavit was drawn for each surety, wherein was set forth "the name and residence of the surety, the amount of real estate, its location, its value, whether or not incumbered, if so, to what amount; next, the amount of his personal property, its character, whether or not incumbered, and if so, to what amount; next, whether or not the surety was upon any other bond; next, whether or not there were any judgments against the surety, and finally summing up that he owned so much over all his debts and liabilities, naming the sum. Each of these questions each surety answered favorably and swore to. The justifications were extraordinary in their minuteness, as the affidavits will show." This being done, a bond sufficient in form was signed by the "procured" sureties. One of the persons who signed, said to be a "very wealthy man," was paid \$125 for what he did. Another, "the son of a former judge of the supreme court of the state of New York," received \$12.50; another, a colored porter in a lawyer's office, \$10; another was paid \$10; and another was promised \$50, but actually paid nothing. They were all irresponsible pecuniarily, and known to or suspected by the police of the city of New York as "purchasable sureties." The money to pay them for their fraudulent work

was furnished by an agent of the appellant company under the form of buying back one of the worthless bonds promised as a reward for what was done. After the bond was executed by the sureties thus obtained, the president of the appellant corporation was called in. He signed officially the name of the corporation, and affixed the corporate seal, but did not see or ask to see any of the persons who had become bound with his company. Neither he nor any other person actually interested in the litigation became in any manner personally bound. With such a bond, procured in such a way, the president of the corporation presented himself at the last moment to the justice of this court, who heard the cause in the circuit court at his summer residence in Vermont, and asked that the bond be approved. On its presentation, as we are informed by the testimony of the president himself, the justice read and seemed to be impressed "with the fullness and particularity of the justifications." He said, "This seems to be a good bond." The reply was, "Yes, judge, I believe it to be a very good bond." The justice then asked as to one of the parties whose name appeared, and the reply was, "I am informed that he is the son of a former judge of the supreme court of the state of New York of that name," adding that another of the signers, "I am advised, is a very wealthy man."

§ 1528. *Where the approval of a bond is obtained by fraud and perjury the supersedeas will be vacated.*

Under these circumstances the bond was approved. To allow it to stand and to operate as a stay of execution upon an important decree until the case can be reached in its order on our crowded docket would be a reproach upon the administration of justice. We are aware that in *Jerome v. McCarter*, 21 Wall., 17, we said, "That upon facts existing at the time the security was accepted, the action of the justice, within the statute and within the rules of practice adopted for his guidance, is final," and that we would "presume that when he acted, every fact was presented to him that could have been." We are not inclined to depart from that rule, but, in a case of this kind, fraud is always open to inquiry. When discovered, justice requires that summary relief should be afforded whenever and wherever it may be done consistently with the forms of orderly judicial procedure. This bond is as much false as if it had been forged. The persons who signed it are not in fact what they were represented to be. We have no hesitation in setting aside the approval of the bond.

§ 1529. *A new bond will not be accepted where the approval of the old one was obtained by means of perjury.*

2. As to the acceptance of a new bond in the place of the old one. This application is addressed to our judicial discretion, and is based on the alleged ignorance of the officers and agents of the appellant corporation as to the character of the bond they got accepted. They insist in the most positive manner that they were deceived, and that they actually believed the security they offered was ample. The character of the president is vouched for under oath by many persons occupying high positions in public and private life, and they all say "they do not believe he would knowingly countenance or in any way participate in or suffer an attempt to impose on the supreme court of the United States, or any justice thereof, a fraudulent or worthless bond;" but the fact still remains that he did present such a bond, and if he was ignorant of the wrong that was being done, the other agents of the company were not. Taking the whole case together, we think it quite as incumbent on us to refuse

to accept a new bond as it is to set aside the old one. The motion to vacate the *supersedeas* is granted.

§ 1530. *Ordered, that the appeal be dismissed unless papers omitted from the record be supplied by certain time.*

3. As to dismissing the appeal. The evidence shows that after the bond was accepted the president of the railroad company went with his own copyists to the office of the clerk of the circuit court, and in the absence of the principal clerk selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript. This being done, he caused a certificate to be added, signed in the name of the clerk by a deputy, and sealed with the seal of the court, to the effect that the transcript annexed contained copies of such entries, papers and proofs as were "necessary on the hearing of the appeal prayed and allowed in the said cause." It is now alleged that many important papers and documents used on the hearing below, and necessary for the proper determination of the cause here, have been omitted from the transcript as filed. While we desire to encourage in every proper way all attempts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not do to permit the appellant or the plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court. We, therefore, order that the appellees file with the clerk of this court and with the counsel for the appellant, on or before the 1st day of February next, a statement of the papers, documents and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause, and that unless the appellant shall, on or before the 15th day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the circuit court or his deputy, under the seal of the court, this appeal be dismissed. If in this way unnecessary papers are brought up, we will, on application, make such order in respect to costs as may under the circumstances be proper.

SAGE *v.* RAILROAD COMPANY.

(6 Otto, 712-716. 1877.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This case was before us at the last term, upon a motion to dismiss an appeal from a decree entered October 22, 1875, and to vacate a *supersedeas* upon that appeal. We denied the motion to dismiss, but vacated the *supersedeas*. The case is reported in 93 U. S., 412. (§§ 1493-1498, *supra*.)

After the vacation of the *supersedeas*, the decree of October 22, 1875, was executed July 18, 1877, by a sale of the mortgaged property. The master having reported the sale to the court, Sage, Cowdrey & Buell, who had been admitted as defendants in the suit, for the purpose of an appeal from the former decree, filed exceptions; which were overruled August 31, 1877; and an order was entered confirming the sale and directing the master to convey the property sold to the Farmers' Loan and Trust Company,—the purchaser, in trust for the parties interested in the purchase under the provisions of the trust deed, as defined in the original decree. At the same time, a deed of conveyance executed by the master was presented, and the court ordered that it be delivered to the Farmers' Loan and Trust Company and recorded. Afterwards, during the same day, Sage, Buell & Cowdrey, in open court, prayed an appeal

to this court, from certain orders entered in the cause, October 21, 1875, and from the decree of confirmation, and "each and every other order made in the cause, August 31, 1877." They also asked that security for a *supersedeas* might be accepted and approved. The court entered an order allowing the appeal, but refused to accept a *supersedeas* bond, or, as it is expressed in the order, refused the *supersedeas*. The bond for the appeal was fixed at \$1,000, to be made to the clerk of the court, in trust for whom it might concern, approved by one of the judges of the court and filed within thirty days. No bond of any kind was executed at that time. On or about the 15th of September, 1877, Sage, Buell & Cowdrey presented to Mr. Justice Hunt, of this court (and a justice assigned to a different circuit from that in which the district of Iowa is situated), a petition setting forth the taking of an appeal by them, in open court, from the order of August 31st, and its allowance; and stating, further, that "no *supersedeas* bond was given or approved." They thereupon tendered a bond, payable to the clerk of the court, in the sum of \$20,000, which they asked that justice to approve and allow "to operate as a *supersedeas* bond in the . . . cause." The security being satisfactory, the bond was "approved to operate as a *supersedeas* when the same was filed in the office of the clerk of the circuit court of the United States at Des Moines, Iowa;" and it was so filed September 22, 1877. On the 24th of September, 1877, Sage and Cowdrey executed another bond, payable to the clerk, in the sum of \$1,000, conditioned according to law, for a *supersedeas*; which was approved by the district judge for the district of Iowa and filed in the clerk's office, October 11, 1877. The appellees now move to dismiss the appeal; or, in case that motion shall not be granted, for a vacation of the *supersedeas*.

§ 1531. *An appeal may be taken from a final decree confirming a sale.*

1. As to the appeal. It is clear that this appeal does not bring up for examination the orders of October 21, 1875. Every proceeding in the cause which was prior to October 22, 1875, must be examined, if at all, under the appeal from the decree of that date still pending here. The only order made August 31, 1877, which is in the nature of a final decree, is that confirming the sale and directing the conveyance to the purchaser by the delivery of the deed presented and approved. We have often decided that a decree confirming a sale, if it is final, may be appealed from. *Blossom v. Railroad Company*, 1 Wall., 655; *Butterfield v. Usher*, 91 U. S., 246. In this case it is final, so far as title under the sale is concerned. It cuts off the equity of redemption by the railroad company and the junior mortgagees and general creditors, except as provided in the decree of October 22d; and passes the title to the purchaser, subject to certain trusts already fixed by the court, over which the present appellants have control only through their appeal from the former decree. No reversal of any order hereafter made will necessarily divest this title. The proceedings hereafter will relate only to the disposition of the property acquired by the purchase and the proceeds of the sale. For relief against the sale, resort can alone be had to an appeal from the decree of confirmation.

§ 1532. *Any justice of this court may approve a bond which will operate as a supersedeas.*

2. As to the *supersedeas*. The statute makes no provision in terms for the form of the allowance of an appeal (Rev. Stat., sec. 692); but as there can be no appeal without the taking of security, either for costs or costs and damages, and this is to be done by the court, or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is, in legal

effect, the allowance of an appeal. If the security is given and accepted in open court during the term at which the decree appealed from is rendered, no citation is necessary; because the parties, being presumptively present during the whole term, are charged with notice of all that is done affecting their interests. Whenever, therefore, security for an appeal is accepted during the term, an appeal is allowed. If the security is taken out of court, and after the term, a citation should be issued to bring in the parties, unless they voluntarily appear; for, until the security has been accepted, the allowance of the appeal cannot be said to have been perfected. Whoever can sign a citation may allow an appeal; and by section 999, Revised Statutes, it is provided that this may be done by a judge of the circuit court or a justice of this court. The power is not confined to the justice assigned to the particular circuit in which the court that rendered the decree is held. When, therefore, Mr. Justice Hunt accepted the security in this case, he allowed an appeal, which, by reason of the form of the security, was to operate as a *supersedeas*. No question in respect to a citation arises, because the appellees have appeared. The refusal of the circuit court to accept a *supersedeas* bond when offered during the term did not necessarily take from a judge of that court, or a justice of this court, the power to approve one thereafter. It is true that the bond accepted in this case recites an allowance of an appeal in open court; but this is mere surplusage, and does not affect either the appeal or the validity of the bond. It may be that the form of the application was one calculated to mislead the judge, and that it did do so; but the fraud, if any, was not such as, in our opinion, would justify us in setting aside what has been done. We are satisfied that the appellants were entitled to their appeal; and that, if taken in time, the *supersedeas* followed as a matter of law upon the giving of the necessary security. We ought not to set aside a *supersedeas*, in a case like this, simply because the justice who approved the bond, and thus allowed the appeal which operated as a *supersedeas*, might have sent the appellants to another judge with their application, if he had known all the facts. We are not now called upon to determine the effect of the *supersedeas* which has been obtained; but we are of the opinion that, to the extent it may properly operate as a stay of proceedings, it must be sustained. The motions to dismiss the appeal and vacate the *supersedeas* are consequently denied.

EX PARTE THE MILWAUKEE RAILROAD COMPANY.

(5 Wallace, 188-190. 1866.)

STATEMENT OF FACTS.—In this case the judge refused to approve the appeal bond as a *supersedeas*, because all the sureties were non-residents of the district. Petition for a *mandamus* to compel the approval.

§ 1533. *Non-residence of the sureties within the district is not a sufficient reason for rejecting an appeal bond.*

Opinion by MR. JUSTICE MILLER.

Although this court does not concur in the opinion of the district judge, that the fact of the non-residence of the sureties within the district is a sufficient reason for rejecting a bond which is in all other respects unobjectionable, we are not inclined to interfere by *mandamus* with the discretion of that judge in approving or rejecting a bond offered for his approval. If we had the right to do this, which is extremely doubtful, it is unnecessary, as the remedy which is in our own hands is ample.

§ 1534. — *but the supreme court will not award a mandamus, but will order a supersedeas.*

The case being properly in this court by appeal, we have, by the fourteenth section of the judiciary act, a right to issue any writ which may be necessary to render our appellate jurisdiction effectual. For this purpose the writ of *supersedeas* is eminently proper in a case where the circumstances justify it, as we think they do in the present instance. *Hardeman v. Anderson*, 4 How., 640, is an example of the exercise of this power precisely in point. We shall therefore make an order, that upon the filing of a bond for the sum of \$50,000, with the usual conditions, at any time within thirty days from this date, which shall be approved by the clerk of this court, a *supersedeas* will issue from this court to the judge of the circuit court of the United States for the district of Wisconsin, and to the marshal of the United States for said district, commanding a stay of proceedings on said decree until the further order of this court, the same being superseded.

SEWARD *v.* CORNEAU.

(12 Otto, 161-163. 1880.)

APPEAL from U. S. Circuit Court, District of Louisiana.

§ 1535. *A bond is not sufficient for an appeal or a supersedeas if it does not secure costs.*

Opinion by WAITE, C. J.

The bond in this case is insufficient in form either for the purpose of a *supersedeas* or an appeal, inasmuch as it contains no security for costs. This, however, does not necessarily avoid the appeal; but we may impose such terms on the appellants for the omission as, under the circumstances, shall seem to be proper. *Martin v. Hunter's Lessee*, 1 Wheat, 304; *Davidson v. Lanier*, 4 Wall., 447. The appeal will, therefore, be dismissed, unless the appellants, on or before the first Monday in January next, give bond, with good and sufficient security, in due form of law, to prosecute their appeal to effect, and to answer all damages and costs if they fail to make their plea good; the bond to be in the penal sum of \$1,000, and the security taken and approved by the justice of this court assigned to the fifth circuit; and it is so rendered.

CATLETT *v.* BRODIE.

(9 Wheaton, 553-555. 1824.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—A motion has been made to dismiss this and several other suits, unless the plaintiff in error shall give new bonds for the prosecution of the writ, within a limited period, to be fixed by the court, upon the ground that the writs of error have been allowed by the judges of the circuit court for the District of Columbia, upon bonds being given in small sums to respond the damages and costs, the debts secured by the judgment being very much larger.

§ 1536. *A writ of error bond, to operate as a supersedeas, must cover the full amount of the judgment. (a)*

The judiciary act of 1789, c. 20, s. 22, requires every judge or justice, signing a citation on a writ of error, to take good and sufficient security that the plaintiff in error "shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." A writ of error lodged in the

(a) But see *Jerome v. McCarter*, *infra*, § 1540 *et seq.*

clerk's office, within ten days after the rendition of judgment, operates as a *supersedeas* of execution; and the question arises, whether, in cases where it operates as a *supersedeas*, the security taken by the judge or justice ought not to be sufficient to secure the whole amount of the judgment. It has been supposed at the argument, that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word "damages" is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only; and for such amount only is the obligee entitled to judgment. In the present case, and in the other cases which are in the same predicament, the court directs that these suits stand dismissed, unless the plaintiff in error shall give good and sufficient security to an amount to secure the whole judgments, on which the writs are brought, within thirty days from the rising of this court, such security to be taken and approved by any judge or justice by whom a writ of error or citation may be allowed.

STAFFORD *v.* UNION BANK OF LOUISIANA.

(16 Howard, 135-142. 1853.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the district court of Texas, and a motion is made to dismiss it, on the ground that security has been given in the sum of \$10,000 only, when the sum decreed to be paid was \$65,000. And a *procedendo* is prayed, commanding the district court to execute the decree. Notice of this motion was acknowledged by the counsel for the appellant the 11th of March, 1854. As the appeal was taken since the commencement of the present term, the appellant is not bound to file the record until the next term.

By the decree in the district court, a mortgage on a large number of slaves, to secure the payment of a debt due to the Union Bank of Louisiana, was foreclosed. A receiver having been previously appointed, who hired out the slaves and received the hire, he was directed by the decree to pay to the bank the sum of \$25,329.39, moneys in his hands, and that the residue of the money due, amounting to the sum of \$39,877.13, should be paid on the 1st day of July next, and if not so paid, that the slaves should be seized and sold. On the 7th of March, 1854, the tenth day after the decree was entered, the defendants prayed an appeal, which was granted, and on the same day a bond was given in the penal sum of \$10,000, as required by the court.

§ 1537. *Where an appeal has not been regularly entered on the docket, the court will not entertain a motion to dismiss it.*

As the appeal has not been regularly entered on the docket, and as the appellant is not bound to enter it until next term, a motion to dismiss it cannot be entertained. But as the record is before us, which states the facts on which the motion is founded, the court will suggest their views of the law in regard to an important point of practice.

§ 1538. *To supersede a decree foreclosing a mortgage, the security must equal the amount decreed to be due. (a)*

The act of 1803 (2 Stats. at Large, 244) places appeals in chancery on the same footing as writs of error. And in the case of *Catlett v. Brodie*, 9 Wheat., 553, this court held that security must be given on a writ of error, to operate as a *supersedeas*, for the amount of the judgment. By the act of 12th December, 1794 (1 Stats. at Large, 404), when a stay of execution is not desired, security shall be given only to answer costs. A motion was made, in the district court, to dismiss the allowance of the appeal, on the ground that security in the amount of the decree had not been given. This was opposed by the counsel of the appellant, and it was alleged, as the receiver had given two bonds, each in the penalty of \$20,000, for the faithful discharge of his duties, and as the mortgaged slaves were in possession of persons who had hired them, who had given bonds in the joint penalty of \$80,000 for the safe-keeping and delivery of the slaves, that no further security under the statute ought to be required to entitle the appellant to a *supersedeas* against the decree. The court overruled the motion. The decision of this court in the case above cited was that the words of the act, "sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good," do not refer to "the nature of the claim upon which the original judgment is founded, but that they are descriptive of the indemnity which the defendant is entitled to if the judgment be affirmed." And the court further say: "Whatever losses he, the defendant in error, may sustain by the judgment not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security." If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree. There is no discretion to be exercised by the judge taking the bond, where the appeal or writ of error is to operate as a *supersedeas*. This rule was established in 1817, and it has been adhered to ever since. The hardship of this rule on the appellant is more imaginary than real. Suppose the appellant had given ample personal security on the original obligation for the payment of the money, and the sureties were sued with the principal, would they be excused from giving bail on an appeal or writ of error, as the act requires? And how does such a case differ from the one before us, where mortgage has been given on personal property? If the receiver has given security, in \$40,000, faithfully to pay over the money in his hands; and if those persons who employed the slaves have given bond in \$80,000 for the safe-keeping and delivery of them, and the sureties are good, the appellant can have no difficulty in giving the security on his appeal, to the amount of the decree in the district court. It is true the property is taken out of his possession and control, but it is in possession of persons who gave bonds for its safe-keeping and delivery when required, a part of it in payment of the decree, and the residue to be sold in satisfaction of the balance of the decree. In this condition of the property, if the transaction be *bona fide* (and it may be presumed to be fair, as the arrangement was made under the order of the court), the responsibility on the appeal bond can be little more than nominal. The state of the property affords more safety to the security on the appeal bond than if the property and money were

(a) At the next term of the court, on motion by the appellees, a peremptory *mandamus* was awarded, requiring the district judge to execute the decree in the above cause, the security not being sufficient to authorize a stay of execution. *Stafford v. Union Bank of Louisiana*,* 17 How., 275. The same order, for the same reason, was also made in *United States v. Guthrie*,* 17 How., 283.

in possession of the appellants, and under their control. A double mortgage is on the property that it shall be faithfully applied to the payment of the decree.

The appeal is for the benefit of the appellant. A decree in the district court has been entered against him, and there is, in the custody of the law, a sufficient amount of money and property to pay the amount decreed. An appeal suspends the payment some one or two years, and as this is done for the benefit of the appellants and at their instance, is it not equitable that the risk should be provided for by them? The law has so decided, by requiring security to be given to the amount of the decree, without reference to the nature of the suit. The provision of the act as construed by this court is not a matter over which the court can exercise a discretion. The language is mandatory and must be complied with. We can know nothing of the responsibility of the receiver or of the hirers of the slaves, nor is it proper that we should inquire into their circumstances and the responsibility of the sureties, with the view of substituting them for the security on the appeal, which the law requires. For the reasons stated the court cannot dismiss the appeal, nor award a *procedendo*. A more appropriate remedy would seem to be a rule on the district judge to show cause why a *mandamus* should not be issued; but this can be done only on motion.

§ 1539. *Where a case is not properly before the supreme court, it is not proper to settle, by a mere dictum, an important matter of practice, by advising a party as to the proper mode to be pursued.*

Dissenting opinion by MR. JUSTICE CATRON.

The case was decided in the district court in March last, and during the present term of this court, and an appeal taken to our next term; consequently, the cause is not here, nor have we any power to dismiss it. The motion to dismiss must therefore be overruled. But I do not agree to the opinion expressed by a majority of my brother judges, advising the appellees what course to pursue against the district judge: First, because we have no case before us authorizing such an expression of opinion; and I am opposed to a mere dictum attempting to settle so grave a matter of practice. And secondly, my opinion is that the statute referred to does not govern a case in equity where property is pursued under a mortgage, and the mortgaged property, at the complainant's instance, has been taken into the hands of the court, and so remains at the time of the appeal. If the property, from its perishable nature, had been by interlocutory decree converted into money, and this was in court, then I think no security to cover its contingent loss should be required; and here \$25,000 has been earned, previous to the suit, by the mortgaged slaves, and is in court. That this mortgagor is stripped of his property, and cannot give security for so large an amount, is manifest, and to construe the act of congress as if this was a simple judgment at law would operate most harshly.

JEROME v. McCARTER.

(21 Wallace, 17-33. 1874.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This is a bill filed by a junior mortgagee of the Lake Superior Ship-Canal, Railroad and Iron Company against the company, a bankrupt, and its assignees in bankruptcy, for the foreclosure of his mortgage and a sale of the mortgaged property, subject to certain prior incumbrances. The

decree appealed from ordered the payment of \$1,057,686 to the complainant by the company or the assignees, and in default of such payment, the sale of the mortgaged property, subject to an incumbrance thereon of \$1,500,000 and upwards. From this decree both the company and the assignees have appealed. The justice who granted the appeal and signed the citation accepted the *supersedeas* bond in the sum of \$10,000. The appellee now moves to increase the amount of the bond and require additional sureties.

§ 1540. *Authority of a justice of the supreme court to approve a supersedeas bond.*

The twenty-second section of the judiciary act of 1789 provides that every justice or judge signing a citation or any writ of error shall take good and sufficient security that the plaintiff shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good. The twenty-third section provides that if the judgment or decree is affirmed upon the writ of error, the court shall adjudge and decree to the respondent in error just damages for his delay, and single or double costs, at its discretion. 1 Stats. at Large, 85. The act of 1803 (2 id., 244) provides that appeals shall be subject to the same rules, regulations and restrictions as are prescribed in cases of writs of error. Under the act of 1789 the amount of the security to be taken is left to the discretion of the judge or justice accepting it. The statute is satisfied if, in his opinion, the security is "good and sufficient." Doubts having arisen as to the extent of the security to be required where there was no *supersedeas* or stay of execution, an act was passed directing that in such cases the amount should be such as in the opinion of the judge would be sufficient to answer all such costs as upon the affirmance of the judgment or decree might be adjudged or decreed to the respondent in error. 1 Stats. at Large, 404.

§ 1541. *Authorities reviewed as to the amount of the security in a supersedeas bond.*

In *Catlett v. Brodie*, 9 Wheat., 553, decided in 1824, this court held that, in cases where the writ of error operated as a *supersedeas*, the security *ought* to be sufficient to secure the whole amount of the judgment. Mr. Justice Story, in delivering the opinion of the court, said: "It has been supposed at the argument that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is that this is not the true interpretation of the language. The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid after the affirmance, these are the damages which he has sustained and for which the bond ought to give good and sufficient security." Accordingly it was ordered that the suit stand dismissed unless security should be given to an amount sufficient to secure the whole judgment. That was a judgment in an action at law for the recovery of money not otherwise secured, and the decision established a rule of practice for that class of cases. Afterwards, in *Stafford v. Union Bank*, 16 How., 139, decided in 1853, the court with one dissenting judge held that a *supersedeas* which had been allowed upon an appeal from a decree for the foreclosure of a mortgage on slaves should be vacated unless a bond was given which would secure the payment of the decree. Mr. Justice McLean, who delivered the opinion of the court, after referring to the case of *Catlett v. Brodie*, said: "If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree.

There is no discretion to be exercised by the judge taking the bond where the appeal or writ of error is to operate as a *supersedeas*." Thus the rule which had been adopted in respect to judgments at law was extended to decrees in chancery. It was a rule controlling to some extent the discretion of the judge in such cases, and to be observed so long as it continued in force.

§ 1542. *Rules of the supreme court as to the amount of supersedeas bond.*

It did continue until the case of *Rubber Company v. Goodyear*, 6 Wall., 156, decided in 1867, and the adoption at the same time by the court of the present rule twenty-nine. That rule provides that where the judgment or decree is for the recovery of money not otherwise secured, the security must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal; but in all cases where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages; or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal. Such was the established rule of practice under the act when the bond now in question was taken. To some extent the old practice had been changed. The act itself remained the same, but experience had shown that the rules which had been adopted to give it effect were not suited to all the cases arising under it, and the new rule was made for the better adaptation of the practice to the protection of the rights of litigants.

§ 1543. *Where a justice of the supreme court takes security for a supersedeas, the amount will not be increased unless there be a change of circumstances.*

This is a suit on a mortgage, and, therefore, under this rule, a case in which the judge who signs the citation is called upon to determine what amount of security will be sufficient to secure the amount to be recovered for the use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on the appeal. All this, by the rule, is left to his discretion. In *Black v. Zacharie*, 3 How., 495, it was held that in such a case the justice taking the security was the sole and exclusive judge of what it should be. Since then, in *Rubber Company v. Goodyear*, *supra*, and *French v. Shoemaker*, 12 How., 99, remarks have been made by judges announcing the opinion of the court, which, if considered by themselves, would seem to indicate that this discretion could be controlled here upon an appropriate motion. The precise point involved in this case was not, however, before the court for consideration in either of those, and we think was not decided. We all agree that if, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties upon the bond have changed, so that security which, at the time it was taken, was "good and sufficient," does not continue to be so, this court may, upon a proper application, so adjudge and order as justice may require. But upon facts existing at the time the security was accepted, the action of the justice within the statute and within the rules of practice adopted for his guidance is final. And we will presume that when he acted every fact was presented to him that could have been. So, while we agree that in a proper case, after an appeal or writ of error taken here, this court may interfere and require additional security upon a *supersedeas*, it will not attempt to direct or control the discretion of a judge or justice in respect to a case as it

existed when he was called upon to act, except by the establishment of rules of practice. If we can be called upon to inquire into the action of the justice in respect to the amount of the security required, we may as to the pecuniary responsibility of the sureties at the time they were accepted.

§ 1544. *A supersedeas bond does not secure accumulations of interest.*

We understand the counsel for the appellee to contend, however, that in this case the justice did not act within the established rule, and that on this account we may review his action. The claim is, that the rule requires indemnity for interest upon the appeal, and this is construed to mean that the security must be such as to secure the payment of all the accumulation of interest upon the mortgage indebtedness pending the appeal and *supersedeas*. This we think is not the requirement of the rule. The object is to provide indemnity for loss by the accumulation of interest consequent upon the appeal, not for the payment of the interest. What the loss is likely to be depends upon the facts. As to this the justice, after consideration of the case, must determine. In this case there can be no loss to the appellee if, as is contended by the appellants, the value of the mortgage security is sufficient to pay all the incumbrances, with accruing interest, when a decree of affirmance shall be rendered upon the appeal. Neither can there be if, as is contended by the appellee, the value of the property is much less than the amount of the prior incumbrances. If, upon the case made by him, the property depreciates in value during the continuance of the appeal, he will suffer no loss, because if sold now, upon his theory, he would receive nothing. Not being worth as much as the amount of the prior incumbrances, it is not to be supposed that a purchaser can be found to take it at a price that would yield anything to apply on his debt. The appellee may lose the opportunity of bidding in the property at a reduced price and speculating upon its rise, but the loss of such profits is not recognized by the court as legitimate "damages for the delay." In either view of the case, therefore, a judge would be justified in accepting a bond for a comparatively small amount.

§ 1545. *The supersedeas bond need not be for so large an amount as to cover accumulations of interest, where the appellant is a bankrupt.*

There is another consideration which will justify the action of the judge under the rule. As has been seen, the suit is brought for the foreclosure of a mortgage. The debtor is a bankrupt corporation. Its whole property, including its corporate franchises, has passed to its assignees in bankruptcy. It is in no condition to accumulate property which can be subjected to the payment of its debts. It is, to all intents and purposes, dead. No damage can result, therefore, from the appeal by reason of the delay in obtaining an execution against the company under the provisions of rule 92, regulating the practice in courts of equity, for the collection of any balance that may remain due to the complainant upon the mortgage debt after the security is exhausted. If the company were not in bankruptcy the pendency of this suit would not prevent an action at law to recover the debt from other property pending the appeal. For these reasons a judge, in the exercise of a reasonable discretion, might properly accept security less than would be sufficient to insure the payment of accumulating interest, even upon an appeal by the corporation itself. But it is apparent that the corporation is only a nominal party to this appeal. The real parties in interest are the assignees. The complainant is a creditor of the estate. Upon proofs of his claim he will be entitled to receive his dividend with the other creditors. The accumulated interest will participate in this dividend as well as the principal of his debt. He has, therefore, without any

further security, all the indemnity which the assignees can give him without they or their sureties assume personal responsibility.

All these facts were proper for the consideration of the judge when he determined upon the amount of security necessary to indemnify the appellee against loss by the appeal. We think, therefore, upon the case made, the action of the justice approving the bond is conclusive.

Motion denied.

UNITED STATES EX REL. DAY *v.* MAYOR, ETC., OF THE CITY OF NEW ORLEANS.

(Circuit Court for Louisiana: 8 Federal Reporter, 112-114. 1881.)

§ 1546. *The amount of a supersedeas bond is within the sound discretion of the court.*

Opinion by PARDEE, C. J.

There is no doubt of the right to the writ of error in those cases where the amount of the judgment to be paid by taxation exceeds \$5,000, exclusive of costs. Counsel concede the right to a *supersedeas*, and only differ as to the amount of the bond to be required. The amount of the bond is to be determined by the court allowing the *supersedeas*, in its sound discretion, under the laws and the rules of the supreme court. Rule 29 of the general rules of the supreme court seems to be the only rule attempting to guide the court in fixing the amount of the bond. This rule provides for the following conditions: (1) Where the judgment or decree is for the recovery of money not otherwise secured; (2) where the property in controversy necessarily follows the event of the suit; (3) where the property is in the custody of the marshal under process; (4) where the proceeds, or a bond for the value thereof, is in the control or custody of the court.

§ 1547. *Rule governing amount of bonds for supersedeas in mandamus cases.*

The cases under consideration come under none of these conditions. The judgments sought to be stayed are not for money or property, but to direct the performance of a ministerial act, to wit, the levy of taxation, looking to the payment of a specific sum of money. The defendants in the judgments are municipal officers, having little or no pecuniary interest in the matter. They have a right to their writ of error; and for a *supersedeas* to require of them a bond for the whole amount of the original judgment, including "first damages for delay," and costs and interest on the appeal, would be a great hardship, which this court will not exact unless the law and duty clearly require it. The object of the bond is to secure the defendant in error against damages from delay, and costs in prosecuting the writ. So, under rule 29, when the property is supposed to be secure, as where it necessarily follows the event of the suit, or is in the custody of the court, a bond is only to be required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal. From the terms of the judgments sought to be stayed, it would seem that the amount of the judgments, costs accrued, and interest to accrue, are secured by all the taxable property in the city of New Orleans, and would need no further security. This view, in a similar case, appears to have been taken by Mr. Justice Miller and Judge Treat, in the eighth circuit, eastern district of Missouri. See case of *Fourth Nat. Bank v. Franklin County*, 10 Cent. Law J., 193.

If this be the case, only the costs incurred in the prosecution of the writ, and

just damages for delay, need to be secured by the *supersedeas* bond. Indeed, so far as costs are concerned, the plaintiff in error will have to pay for his record, and give other stipulation for costs in the supreme court. See General Rules, No. 10. The general damages for the delay in the payment of money is the interest allowed by law, and this seems to be provided for and secured with the main judgment. Now, what are the special damages? Section 1010 of the Revised Statutes reads: "Where, upon a writ of error, judgment is affirmed in the supreme court or a circuit court, the court shall adjudge to the respondent in error just damages for his delay, and single or double costs, at its discretion."

Section 2 of rule 23 reads: "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of ten per cent., in addition to interest, shall be awarded upon the amount of the judgment."

It seems very doubtful to me if, under the above rule, any damages may be awarded by the supreme court in any case where there is no direct appeal from a money judgment. Under a similar rule in the state of Louisiana (C. P., 907), it has been always held that no damages could be awarded except on moneyed judgments. 19 Ann. Rep., 327; 13 Ann. Rep., 365. No adjudicated cases under the federal rule have come under my notice; and at all events, in these cases under consideration, if defendants in error are secured for costs and these possible special damages, they are entirely secure, and have no cause to complain. One hundred and fifty dollars will secure the costs — double costs, if adjudged. Ten per cent. on the amount of the original judgment will secure all damages awarded for a frivolous appeal. Any bond required for a larger amount would be an unnecessary hardship for the city, and without benefit to the defendants in error, save in a way scarcely legitimate — that of deterring the city from seeking a higher court. In addition to all this, counsel for the plaintiffs in error admits that the supreme court may at once, on filing the record, pass on the question and rectify what is here ordered amiss.

§ 1548. *Amount of bond fixed.*

Let the bonds in the cases of *mandamus* against the city of New Orleans, wherein the matter in dispute exceeds the sum of \$5,000, exclusive of costs, and wherein writs of error are applied for and a *supersedeas* asked, be fixed at the sum of \$150, plus ten per cent. of the amount of the judgment or judgments sought to be stayed. Where no *supersedeas* is asked, let the bond be in the sum of \$150.

BUTCHERS' ASSOCIATION *v.* SLAUGHTER HOUSE COMPANY.

(Circuit Court for Louisiana: 1 Woods, 50-55. 1870.)

Opinion by BRADLEY, Circuit Justice.

STATEMENT OF FACTS.—In these cases writs of error were allowed, and bonds to prosecute and to answer all damages and costs were taken within ten days from the rendering of the decrees in the state court, to which the writs were directed. The bonds were required in such amounts respectively as then appeared to me sufficient, being the same as required on appeal from the state district to the state supreme court. Affidavits have since been laid before me, for the purpose of showing that the amount of the bonds is not sufficient as security for the damages which the defendants in error will sustain if the writs

are to be deemed a *supersedeas* of the decrees and executions thereon, and if the decrees should be affirmed.

In the private suits the decrees are not for sums of money, except as to costs; but in the suits of defendants in error, they are for perpetual injunctions against the plaintiffs in error, to restrain them from violating the exclusive right granted to the defendants of having cattle landings, live stock depots and slaughter houses in New Orleans. In the suits of the plaintiffs in error, the decrees are for the dismissal of the petitions, and a dissolution of the injunction obtained by the plaintiffs. If these decrees should severally be affirmed, there would still be no decree against the plaintiffs in error for the payment of any money, other than the costs; but only for the perpetuity of the injunctions of the defendants and the dissolution of the injunctions of the plaintiffs.

But the defendants in error insist that they will, in the meantime, sustain damage by the suspension of their injunctions if they are suspended by the writs of error, and by the continuance of the plaintiffs' injunctions, if they are continued by the writ of error, and that this damage will be largely in excess of the bonds taken on allowing the writs of error. I do not see any evidence that this effect will follow in any case but that of the Live Stock Dealers and Butchers' Association against the Crescent City Live Stock Landing and Slaughter House Company. In this case it does appear that the probable emoluments and fees which will accumulate and become due from the plaintiffs to the defendants in error during the pending of the appeal will largely exceed the amount of the bond taken. The bond is in the penalty of \$10,000, and the fees will probably accumulate in one year to the amount of over \$60,000. But have I any right to demand a bond sufficient to guaranty the payment of this accumulation of fees? At first I supposed I had such a right; and I purposed requiring a bond to be given to the amount of \$100,000. But on a more careful examination of the cases, particularly of the case of *Roberts v. Cooper*, 19 How., 379, I am satisfied that it would not be competent for me to do so. In that case a plaintiff in ejectment recovered the land and nominal damages. The defendant brought a writ of error and gave a bond of only \$1,000, being all that the judge required. An affidavit being presented to the court, showing that, by being kept out of possession pending the writ of error, the plaintiff would suffer \$25,000 damages, the court refused to order an increase of the bond, holding that the case was not provided for by any legislation of congress.

§ 1549. *When a writ of error is applied for and allowed, the jurisdiction of the supreme court attaches, and that of a judge at chambers is superseded.*

On further examination, I am not entirely satisfied that I could now order an additional bond, if one were proper to be demanded. The language of several of the cases seems to imply that as soon as the writ of error or appeal is allowed, the jurisdiction of the supreme court attaches to the case, and supercedes the further action of the judge at chambers. In the *Rubber Company v. Goodyear*, 6 Wall., 156, the court says: "In equity cases the appellate jurisdiction of this court attaches upon the allowance of the appeal." And again: "The question of sufficiency (of the bond) must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal, this question, as well as every other in the cause, becomes cognizable here." I am referred to one case, that of *Black v. Zacharie*, 3 How., 493, in which the circuit court for the district of Louisiana annulled their order for a *supersedeas* on account of the insufficiency of the bond. In the cases before

me, I have made no order for a *supersedeas*, but have left the cases to the legal effect of the several writs of error allowed, having simply approved the several bonds which were tendered in the cases. That approval undoubtedly imports that the bonds are sufficient for a *supersedeas* of further proceeding under the decrees, so far as a writ of error can legally operate as such, and to that extent it was my intention that they should operate.

§ 1550. *Appeals and writs of error to the supreme court of the United States operate as a supersedeas as soon as proper security is given.*

The question as to what is the legal effect of writs of error on subsequent proceedings in these cases, it is not necessary for me to decide. The suits are really suits in equity, the relief sought being an injunction, which is purely equitable relief. In England appeals from decrees in equity do not suspend proceedings in the court below, nor the operation of the orders or decrees appealed from, unless, on special application, an order to that effect be made, either by the court appealed from or the court appealed to. But the reason for this rule seems to be that appeals are allowed there from interlocutory as well as final orders and decrees; and if every appeal had the effect of suspending further proceedings, no case would ever be determined except by consent of parties. *The Warden v. Morris*, 9 Ves. Jr., 316; *Huguenin v. Basely*, 15 id., 184; *Waldo v. Caley*, 16 id., 206. And it seems to be the settled understanding of the courts of the United States, in which and to which appeals are only allowed from final decrees, that an appeal, as well as a writ of error, operates as a *supersedeas*, if taken within the proper time and with an offer of the requisite security. "The act of 1803," says Mr. Justice McLean, in *Stafford v. The Union Bank of Louisiana*, 16 How., 139, "places appeals in chancery on the same footing as writs of error. And in the case of *Catlett v. Brodie*, 9 Wheat., 553, this court held that security must be given on a writ of error to operate as a *supersedeas* for the amount of the judgment." And again, "there is no discretion to be exercised by the judge taking the bond when the appeal or writ of error is to operate as a *supersedeas*. This rule was established in 1817, and has been adhered to ever since." Id., 140. In the *Rubber Company v. Goodyear*, 6 Wall., 156, the court say: "What is necessary is that it [the security] be sufficient, and when it is desired to make the appeal a *supersedeas*, that it be given within ten days of rendering the decree."

But suppose it to be granted that an appeal, properly allowed, is a suspension in equity cases as well as in cases of law; of what is it a *supersedeas*? Does it supersede the decree? Will a defendant, after appealing from a decree for specific performance requiring him to execute a deed, be amenable to an attachment if he neglects to execute such deed? It would seem to be the logical consequence that the whole effect of the decree is suspended, and that without some special order to the contrary (which it seems can only be made by the appellate court), things must remain *in statu quo ante decretum* until the appeal is determined. But on this subject parties must take the law at their peril, as I cannot, sitting here, make any judicial determination which will bind them.

The result simply is that I must, under the circumstances, decline to take any further action with regard to the securities.

DRAPER *v.* DAVIS.

(12 Otto, 370-372. 1880.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The final decree in this cause was rendered April 30, 1878. An order was entered May 7th, on the minutes of the court below, sitting in general term, allowing an appeal to this court, but no security was then taken, either for costs or to obtain a *supersedeas*. On the 29th of June, being the sixtieth day after the rendition of the decree, a bond with sureties in the penal sum of \$1,000, conditioned according to law for a *supersedeas*, was approved by one of the justices of the court below, and filed with the clerk. There is no allegation that the approval of this bond was procured by fraud. On the same day the same justice signed a citation, which was served July 8th. The taking of this security was not the act of the court, but of the justice. On the 20th day of that month, the same justice being satisfied that the bond he had taken and approved was “insufficient and inadequate security,” “ordered that the appellant, within twenty days, . . . file an additional bond in the penalty of \$3,000, with good and sufficient surety to be duly approved, and upon such notice as is required under rule 116 of this [the supreme court of the district] court.” Within the time required by this order, the appellant presented to the justice for approval, an additional bond for the prescribed amount; but it does not appear that it was ever accepted. The appellant fearing, as he alleges, that the court below will proceed to carry its decree into effect pending this appeal, now asks that a writ of *supersedeas* may issue to stay any such proceeding.

§ 1551. *When a justice of the lower court has granted an appeal, taken a bond and issued a citation, he has exhausted his powers.*

When the original bond of \$1,000 was accepted by the justice and the citation signed, an appeal was allowed and security taken, which operated as a *supersedeas*. That transferred the jurisdiction of the suit appealed to this court. As this allowance was the act of the justice of the court and not of the court itself, no such question is presented as was decided in *Goddard v. Ordway*, 101 U. S., 745, where we held that if the allowance was the judicial act of the court in term time, it might, like any other order in the suit, be set aside on proper showing during the term. The power of the justice over the appeal and the security, in the absence of fraud, was exhausted when he took the security and signed the citation. From that time the control of the *supersedeas* as well as the appeal was transferred to this court, and even here, as we held in *Jerome v. McCarter*, 21 Wall., 17, in the absence of fraud, the action of the justice or judge in accepting the security, within the statute and within our rules adopted for his guidance, was final, so far as it depended on facts existing at the time the security was accepted. It follows that the *supersedeas*, which resulted from the taking of the security on the 29th of June, is still in force and has never been vacated. Consequently the court below is without power at this time to proceed with the execution of the decree appealed from, and we will presume that upon an intimation of that kind from us it will not attempt to do so. Should an application be made to us to increase the security on the ground of a change “in the circumstances of the case, or of the parties, or of the sureties on the bond,” “so that security which was good and sufficient” at the time it was taken “does not continue to be so” (*Jerome v. McCarter*,

supra), or to set aside the bond which was accepted on the ground that its acceptance was procured by fraud (*Railroad Company v. Schutte*, 100 U. S., 644), we can then determine whether the *supersedeas* now in force shall be vacated; but on the case as it now stands we think the court below is without power to proceed in the execution of the decree which has been appealed from.

Motion denied, without prejudice to its renewal, should it be necessary.

WILLIAMS v. CLAFLIN.

(13 Otto, 753, 754. 1880.)

APPEAL from U. S. Circuit Court, District of South Carolina.

§ 1552. *A new bond will be required in case of change of circumstances.*

Opinion by WAITE, C. J.

In *Jerome v. McCarter*, 21 Wall., 17, we said that if, after security on an appeal which operated as a *supersedeas* had been accepted, the circumstances of the case, or of the parties, or of the sureties on the bond, had changed, so that the security, which at the time it was taken was sufficient, did not continue to be so, we might, on proper application, so adjudge and order as justice should require. The present appellants are interested only in preserving their security for a debt of the railroad company amounting, when the decree was rendered, to about \$152,000. When they took their appeal, execution of the whole decree had been stayed by another appeal of the present appellees, who were the complainants below. Consequently the amount of security to be given then by these appellants was a matter of but little importance comparatively. The other appeal has been dismissed, and in this way the circumstances of the case are materially changed. It is easy to see that what was sufficient security on this appeal when taken is probably not so now. The bonds secured by the mortgage according to the decree amount to several millions of dollars, and the value of the security is necessarily subject to the fluctuations of trade. The appellants are to a considerable extent interested in the same bonds, but if their debt is paid in full they cannot complain at the execution of the decree.

The *supersedeas* herein will be so far modified as to allow a sale of the mortgaged property to be made under the decree, but the court below will retain in its registry, subject to the order of this court until the final determination of the present appeal, so much of the proceeds as shall be sufficient to satisfy and discharge any balance that may remain of the debt due these appellants, after the proportionate share they receive under the decree upon the bonds and coupons held by them as collateral shall have been applied thereon; and it is so ordered.

§ 1553. *In general.*—When the statute has been complied with, an appeal operates as a *supersedeas* without any order to that effect. *Arnold v. Frost*,* 9 Ben., 267. See § 1481.

§ 1554. A writ of error from the supreme court to the supreme court of a territory will not operate as a *supersedeas* when the steps necessary to make it such under the local law have not been taken. *Sheppard v. Wilson*, 6 How., 277.

§ 1555. The mere filing of an undertaking by the plaintiff in error, without commencing any other proceedings in error, is not, in itself, sufficient to give a stay of proceedings or act as a *supersedeas*. *Glafcke v. O'Brien*,* 1 Wyom. Ty., 316.

§ 1556. Parties who prosecute an appeal from a decree without giving a *supersedeas* bond cannot complain if the decree is carried out pending the appeal, even though to their injury. *Souter v. La Crosse Railroad*, 1 Woolw., 85.

§ 1557. An appeal which does not operate as a *supersedeas* will not prevent the appellee from maintaining an action on the appellant's undertaking on an attachment in the action in the court below. *Bing Gee v. Ah Jim*, 7 Saw., 118.

§ 1558. *Time.*—If an appellant or plaintiff in error desires a stay of execution, he must comply with the requirements of the statute within the ten days. Although the courts have

sometimes enlarged the time before the expiration of the ten days, if the party permits the time to expire he cannot obtain a *nunc pro tunc* order. *The Roanoke*,* 3 Blatch., 390. See § 1452.

§ 1559. A writ of error not sealed until eleven days after the judgment will not operate as a *supersedeas*; and a failure to serve the citation before the return day of the writ is also fatal. *Washington (City of) v. Dennison*,* 6 Wall., 495.

§ 1560. The district court may extend the time for giving a *supersedeas* bond, and when the bond is given it relates back to the time of taking the appeal, and supersedes an execution issued by the district court. *Dutcher v. Woodhull*,* 7 Ben., 313. See § 1465.

§ 1561. A decree was entered on June 3, 1872, as to the order of distribution of a fund in the registry, and on June 6th a further order was made directing distribution. An appeal was taken on June 15th, one Sunday intervening. *Held*, that the appeal was in time to operate as a *supersedeas* under the act of 1789, but that it was governed by the act of June 1, 1872, allowing sixty days for the filing of the appeal bond. *Rodd v. Heartt*, 17 Wall., 354. See the case, §§ 60-62.

§ 1562. Where a continuance is granted to permit a showing by affidavit as to the value of the matter in controversy, the writ of error will not operate as a *supersedeas*. *Williamson v. Kincaid*,* 4 Dal., 20.

§ 1563. The court rendered a judgment on March 2d, requiring a city to levy a tax, and on May 20th the city filed a motion to set such judgment aside, which motion was overruled, and the judgment was re-entered on that day. *Held*, that a writ of error was properly taken from the entry of the latter judgment, and the writ having been sued out in time, and bond given, it operated as a *supersedeas*. *Memphis v. Brown*,* 4 Otto, 715. See §§ 1460, 1461, 1466, 1468.

§ 1564. A final decree dissolving an injunction was entered February 6th; a motion to suspend the order was filed on the same day, and a similar motion by other parties on the 15th, and a petition to open the decree was filed on the 13th; on March 6th a motion to rescind was made, and was denied on the 13th; on March 20th an appeal was prayed in open court, and on the 23d the bond was approved and filed. *Held*, that the decree became final on March 13th, when the motion to rescind was denied, and that the appeal bond was filed in time to operate as a *supersedeas*. *Railroad Co. v. Bradleys*, 7 Wall., 575. See the case, §§ 65-67.

§ 1565. Under the judiciary act of 1789, a writ of error does not operate as a *supersedeas* unless served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment. *Thompson v. Voss*,* 1 Cr. C. C., 108; *Railroad Co. v. Harris*,* 7 Wall., 574.

§ 1566. A copy of a writ of error to a state court must be lodged in the clerk's office of the supreme court within ten days in order to operate as a *supersedeas*. *O'Dowd v. Russell*,* 14 Wall., 402.

§ 1567. The Revised Statutes, § 1007, provide that "in any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of." *Held*, that the time begins to run from the date of the overruling of a motion for a new trial. *Rutherford v. Penn. Mut. Life Ins. Co.*,* 1 McC., 120. See §§ 1445, 1462.

§ 1568. Amount of bond.—Where the judgment is for a large amount it is discretionary with the court to approve of a bond intended to operate as a stay, with a penalty less than double such amount, having regard to the security and its sufficiency for the amount embraced in the condition of the bond. *Hatch v. Coddington*,* 5 Blatch., 523. See §§ 1473, 1474, 1476-1478.

§ 1569. An appeal from a decree of sale in a foreclosure suit does not operate as a stay of proceedings when the appeal bond is only given for costs and damages. *Orchard v. Hughes*, 1 Wall., 76.

§ 1570. It seems that the amount of damages to be inserted in a *supersedeas* bond is within the discretion of the judge signing the citation and allowing it, and his action will not be reviewed by the supreme court. *Ex parte French*, 10 Otto, 5.

§ 1571. Power of supreme court.—Where a writ of error, bond and citation were in due season to operate as a *supersedeas*, and an execution was issued from the lower court notwithstanding, the supreme court issued a *supersedeas* to supersede and quash the execution. *Stockton v. Bishop*,* 2 How., 74.

§ 1572. Where the writ of error is not a *supersedeas* as to the original decree, the supreme court will not quash an execution issued to enforce the decree. *Wallen v. Williams*, 7 Cr., 278.

§ 1573. Where the security taken on an appeal is not in a sufficient amount to operate as a *supersedeas*, the supreme court will issue a *mandamus* to the lower court, requiring the execution of the decree. *Stafford v. Union Bank of Louisiana*, 17 How., 275; *United States v. Guthrie*, 17 How., 283.

§ 1574. Where a writ of error was sued out in time to operate as a *supersedeas*, but was dismissed because the record was not filed in time, the plaintiff in error making affidavit that he relied upon the clerk to send up the transcript as he had promised, the supreme court, on the suing out of a second writ of error, issued a *supersedeas*. *Hardeman v. Anderson*,* 4 How., 640.

§ 1575. The action of the circuit court in quashing a *supersedeas* bond for want of adequate security, pending the hearing of the writ of error, cannot be reviewed by the supreme court. The circuit court is the sole and exclusive judge of the sufficiency of the security, and the appellate court in such a case will not issue a new *supersedeas* to the execution issued after the quashing of the original *supersedeas*. *Black v. Zacharie*, 3 How., 495.

§ 1576. A party was enjoined from using a certain name or title, and from any proceeding whatever not in accordance with certain contracts, and he afterwards instituted a suit in another court to set such contracts aside, introducing new parties, which suit he dismissed on the order of the court issuing the injunction, on pain of imprisonment, and applied to the supreme court for a *supersedeas*, he having appealed from the decree enjoining him. The supreme court refused the *supersedeas*, holding that the court did not misconstrue its decree; and whether it did or not, that it was doubtful whether the supreme court could afford a party any relief in such a case, as the facts supposed did not show that anything had been done to defeat or impair the appellate jurisdiction of the supreme court. *French v. Shoemaker*,* 12 Wall., 86.

§ 1577. Copy to be filed with clerk.— Unless a copy of a writ of error to the circuit from the supreme court be filed with the clerk for the use of the adverse party as required by § 23 of the judiciary act of 1789, the writ of error does not act as a *supersedeas*. *Moore v. Dunlap*, 1 Cr. C. C., 180; *Ex parte Negro Ben*, 1 Cr. C. C., 533.

§ 1578. By only a part of joint defendants.— Judgment in ejectment was recovered against several defendants occupying specific parts of the land in controversy, and all joined in a writ of error, and but two only of them gave *supersedeas* bonds. The court below issued execution and a writ of restitution against all the others. On a petition to the supreme court for a *mandamus* to compel the court below to issue execution and a writ of restitution against those giving *supersedeas* bonds, it was held that although the judgment was against all, and the writ of error was sued out by all, yet as the writ and the *supersedeas* are distinct, those desiring the stay might separate from the others in asking it. *Ex parte French*, 10 Otto, 4.

§ 1579. Not necessary to support appeal.— An appeal will not be dismissed because an order for a *supersedeas* was improperly made; a party is entitled to maintain his appeal though not taken in time to operate as a *supersedeas*. *Hudgins v. Kemp*,* 18 How., 530.

§ 1580. Must recite judgment.— If a *supersedeas* does not recite the original judgment correctly, it, and the execution issued thereon, will be quashed on motion. *Holmes v. Busard*, 2 Cr. C. C., 401; *McSherry v. Queen*, id., 406.

§ 1581. Vacated, proceedings.— Where the *supersedeas* on appeal from a decree is vacated the successful party is entitled to the orders necessary to carry the decree into execution, notwithstanding the pendency of the appeal. *Farmers' Loan & Trust Co. v. Central Railroad*, 4 Dill., 542, 543, 547.

§ 1582. Must come before levy.— A *supersedeas*, in order to stay proceedings on an execution, must come before a levy is made on the execution, and if it comes afterwards the sheriff is at liberty to proceed and sell upon a writ of *venditioni exponas*; and this is also true of an injunction issued after levy by a court of equity. *Boyle v. Zacharie*, 6 Pet., 659. See § 1465.

§ 1583. Jurisdiction of suit on.— A circuit court has jurisdiction of a suit upon a *supersedeas* bond given in that court on a writ of error to the supreme court independent of the citizenship of the parties. *Seymour v. Phillips & Colby Construction Co.*, 7 Biss., 460.

§ 1584. Judgment on.— Judgment may be rendered on a *supersedeas* bond by the territorial supreme court on dismissal of a writ of error. *Murrin v. Ullman*,* 1 Wyom. Ty., 36; *Geer v. Murrin*,* id., 37.

§ 1585. Order to pay a sum to master.— A final decree in equity awarded a certain sum as damages against the defendant, and ordered him to pay to the master \$500, less such sum as had been advanced him by the plaintiffs. The defendant paid \$35, and on demand by the master refused to pay more. The defendant appealed to the supreme court from the whole of the decree, and gave bonds on appeal in the usual form with sufficient sureties, which were duly approved. Citation was duly issued and served. In an application by the master for an attachment against the defendant, it was held that though the defendant had appealed from the whole of the decree, the bond did not cover the amount directed to be paid the master, and that the application must be granted. The case, it seems, would not have been different had there been a separate order as to the master's compensation and a bond to him to stay

proceedings on appeal. The master is not a party to the suit in any sense, and it was not intended that a provision for his payment should be subject to be stayed in its operation by proceedings such as are employed to stay the execution of a decree *inter partes*. *Myers v. Dunbar*, 12 Blatch., 382.

§ 1586. **Foreclosure proceedings.**—Where the successful party in a suit in equity for the foreclosure of a mortgage appeals from the decree, it is not necessary for him to give a bond to stay an execution; and though the other party may subsequently have appealed, yet as the first appeal stayed execution, no bond was necessary on the cross appeal, and it is improper for the court pending such appeal to take any steps to enforce the decree in favor of the appellant. *Bronson v. La Crosse Railroad Co.*, 1 Wall., 409.

§ 1587. **In bankruptcy.**—The effect of a *supersedeas* to a commission in a bankruptcy proceeding is to annihilate the commission and to place the bankrupt with his estate and effects in the same situation that they would have been in had it never existed. The bankrupt, or, in case of his death, his representatives, are fully restored to all their rights over the property. The order of *supersedeas* in such case is sufficient without the actual issuing of the writ. *Morris, Estate of, Crabbe*, 87.

§ 1588. **Injunction.**—It seems that the appeal from a court of equity, and the bond, do not operate as a stay of the injunction already granted in the case. *Whitney v. Mowry*,* 3 Fish. Pat. Cas., 175. See §§ 1449, 1450.

§ 1589. A writ of error to a decree dissolving an injunction on a judgment at law does not operate as a *supersedeas* to the original judgment. *Grundy v. Young*, 1 Cr. C. C., 443.

§ 1590. **In admiralty.**—An appeal in admiralty of itself suspends the execution of the decree of the inferior court. If an agent of the libelants, who also joined in the libel, pay over the proceeds, pending an appeal which stayed the decree, with notice of such appeal, he pays at his peril. *Penhallow v. Doane*, 3 Dal., 87, 118.

§ 1591. Where a decree *in rem* in admiralty is affirmed in the circuit court, and an appeal to the supreme court may operate as a *supersedeas*, summary judgment cannot be entered against the sureties in the appeal bond until after the lapse of ten days. *The New Orleans*,* 17 Blatch., 216.

§ 1592. **Quo warranto.**—A writ of error duly issued to the circuit court for the District of Columbia, to review its decision in a *quo warranto* case, operates as a *supersedeas* on the judgment of the circuit court. *United States v. Addison*, 22 How., 183.

§ 1593. **Mandamus.**—A writ of error to the judgment of the circuit court awarding a peremptory *mandamus*, with proper sureties, is a *supersedeas*, and if the writ has issued within ten days after the judgment, it will be quashed. *United States v. Columbian Insurance Co.*, 2 Cr. C. C., 273. See, also, §§ 165, 1423, 1437.

XII. PARTIES.

SUMMARY — *All parties must join*, § 1594.—*Only parties to the suit*, §§ 1595, 1602.—*Failure to join parties interested*, § 1596.—*Names of parties must be given*, § 1597.—*In name of a boat*, § 1598.—*Where part of the appellants abandon the appeal*, § 1599.—*Bidder at marshal's sale*, § 1600.—*Appeal by receivers*, § 1601.—*Tenant in ejectment*, § 1602.

§ 1594. All the parties to a joint decree must join in an appeal. *Owings v. Kincannon*, § 1603. See § 1627.

§ 1595. Writs of error are governed by the principles and usages of the common law. It is well settled in all common law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment below; nor can any one be made a defendant who was not a party to the judgment. *Payne v. Niles*, § 1604. See § 1622.

§ 1596. Where an appellant fails to join those who are interested in maintaining the decree, he can obtain no relief in the supreme court adverse to their interests. *Terry v. Abraham*, §§ 1605-1607.

§ 1597. An appeal in the name of a certain party & Co. against a ship and owners is fatally defective. The defect is not amendable. *The Protector*, § 1608. See §§ 1623, 1712.

§ 1598. An appeal or writ of error must be brought in the name of a human being, or an aggregation of human beings, such as a corporation or association. An appeal in the name of a steamboat is fatally defective. The states cannot confer on an inanimate object, without sense, or reason, or legal capacity, the right to prosecute legal proceedings in the federal courts. In a suit against a vessel under a state law, a party having an interest in the matter in controversy must connect himself with the suit in such a manner as to enable him to assert his rights in the supreme court. *The Steamboat Burns*, §§ 1609, 1610. See § 1621.

§ 1599. Where part of the appellants abandon the appeal, it will be dismissed as to them, with costs, but the parties remaining may maintain the appeal separately. The proceedings in such case may be such as would have taken place had the parties abandoning the appeal refused to join in the first place. *Todd v. Daniel*, §§ 1611, 1612.

§ 1600. A bidder at a marshal's sale may appeal from an order overruling a petition to complete and confirm the sale. *Blossom v. Railroad Co.*, §§ 1613-1615.

§ 1601. A receiver may appeal from a decree directing him to pay a balance found due from him into court. *Hinckley v. Gilman, etc., R. Co.*, § 1616.

§ 1602. Where the tenant is served in an action of ejectment, but fails to appear and become a party, he cannot have a writ of error from a judgment against the casual ejector. No one but a party to the suit can bring a writ of error. *Connor v. Peugh*, § 1618. See §§ 1622, 1653.

[NOTES.—See §§ 1619-1656.]

OWINGS *v.* KINCANNON.

(7 Peters, 399-403. 1833.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is an appeal from a decree pronounced in the court of the United States for the district of Kentucky, by which Thomas Deye Owings, James W. Blakey, Ralph Phillips, Milton Stapp, John L. Head and Charles Buck were directed to convey and release to the complainant all their right, title and interest in a tract of land mentioned in the decree. An appeal was allowed, and a bond executed by Lewis W. R. Phillips, Sally Head and Nancy Head, the condition of which recites “that, whereas Lewis W. R. Phillips, Sally Head and Nancy Head have prayed for and have obtained an appeal from the seventh circuit court of the United States in and for the Kentucky district to the supreme court of the United States, in a certain suit in chancery wherein said Andrew Kincannon was complainant and Thomas D. Owings, Ralph Phillips, the ancestor of the said L. W. R. Phillips, and John L. Head, the husband of said Sally Head and ancestor of Nancy Head, were defendants: Now, if the said Lewis W. R. Phillips shall well and truly prosecute,” etc. The particular statement in the bond is considered by the court as explaining the general entry granting the appeal, so as to show that from a joint decree against six defendants, only two, represented by their heirs, have appealed. A motion is now made to dismiss this appeal, because, the decree being joint, all the parties ought to join in the appeal.

§ 1603. *Parties to a joint decree must join in an appeal. (a)*

Upon principle it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest

(a) Cases arise where only one of several defendants is affected by the decree, and it is well settled that in such cases the party whose interest only is affected by the alleged error may carry up the case without joining the others in the appeal or writ of error. Exceptional cases of the kind occasionally arise, but where the interest is joint, and the interest of all is affected by the judgment, the rule is universal, that all must join in the writ of error, else it is open to the other party to demand that it be dismissed, unless a severance of the parties in interest has been effected by summons and severance, or by some equivalent action appearing in the record. *Simpson v. Greeley*,* 20 Wall., 152; *Hampton v. Rouse*,* 13 Wall., 187; *Todd v. Daniel*,* 16 Pet., 521. The technical proceeding by summons and severance has fallen into disuse, and it is held that an appeal would be good if it appeared from the record that the party not joining had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, is not sufficient; there should be written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted the appeal to the party who prayed for it, as to his own interest. *Masters v. Herndon*,* 10 Wall., 406. The objection may be made at any time before judgment. *Wilson v. Life and Fire Ins. Co.*,* 12 Pet., 140.

On a joint judgment against three, in a joint action for money lent, all should join in the writ of error; but if a part refuse to join, the question whether the party suing out the writ is entitled to a summons and severance deserves consideration. *Williams v. Bank of the United States*,* 11 Wheat., 414.

A party against whom a separate, distinct, personal judgment for money has been rendered, in which his co-defendants have no interest, may prosecute a writ of error in his own name, without joining the other defendants. *Germain v. Mason*,* 12 Wall., 259. In a suit to foreclose a mortgage, against the mortgagor and certain trustees, a judgment was entered against the mortgagor, and against the trustees as trustees. *Held*, that the mortgagor could prosecute a writ of error without joining the trustees. *Railroad Co. v. Johnson*,* 15 Wall., 8.

ought to unite in the appeal. We have, however, found no precedent, in chancery proceedings, for our government in this case. But in the case of *Williams v. The Bank of the United States*, 11 Wheat., 414, which was a writ of error sued out by one defendant to a judgment against three, the writ was dismissed; the court being of opinion that it had issued irregularly, and that all the defendants ought to have joined in it. By the judicial act of 1789 (1 Stats. at Large, 73) decrees in chancery pronounced in a circuit court could be brought before this court only by writ of error. The appeal was given by the act of 1803. 2 id., 2144. That act declares "that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error." Previous to the passage of this act, the decree under consideration could have been brought into this court only by writ of error, in which writ all the defendants must have joined. The language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error. We think, also, that the same principle would be applicable, from the general usage of chancery, to make one final decree binding on all the parties united in interest. The appeal must be dismissed, having been brought up irregularly.

PAYNE *v.* NILES.

(20 Howard, 219-221. 1857.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case is brought here by a writ of error directed to the circuit court for the eastern district of Louisiana. It appears by the transcript that Niles & Co., citizens of Ohio, brought suit in the circuit court against Andrew Knox, of Louisiana, for the price of certain machinery furnished to the latter for the use of his plantation. They claimed the vendor's privilege on the articles sold, which were still in possession of the vendee. The suit was instituted on the 21st of February, 1855, and on the 17th of April, 1855, a decree was rendered in favor of the plaintiff for \$2,686.69, with interest, and with the vendor's privilege on the machinery. On the 19th of March, 1855, Payne & Harrison, the plaintiffs in error, citizens of Louisiana, filed in the circuit court a petition of intervention in the above-mentioned suit, alleging that Knox was indebted to them in a large sum of money, for which they held a mortgage on the plantation on which the machinery in question was erected, and claiming that their right by virtue of this mortgage was superior to the vendor's lien of Niles & Co., and prayed a citation for Niles & Co.; but did not pray for any process against Knox. Nor does the record show that he ever voluntarily appeared to or answered this petition. And on the 8th of February, 1856, it was by the judgment of the circuit court finally dismissed, with costs. A statement of facts was afterwards agreed on between the counsel for Niles & Co. and the counsel for Payne & Harrison, which is set forth in the transcript, but it does not appear that Knox assented to it, or indeed had any knowledge of it. Afterwards, on the 18th of February, 1856, the counsel for Payne & Harrison represented to the court that Knox had died after the suit on their intervention was instituted, and that no one had qualified as his executor or administrator, and that there was no representative of his estate, except William A. Broadwell, of New Orleans, who was the duly appointed and qualified syndic of said Knox, and thereupon moved the court that the said Broadwell be made a party to the cause, which was accordingly ordered by the

court, and a copy of the order served on him by the marshal on the succeeding day, and on the day of the service this writ of error was sued out by the intervenors, Payne & Harrison.

The writ recites that a judgment was rendered in a case between Niles & Co., plaintiffs, and Broadwell, syndic of Knox, defendant, and Payne & Harrison, intervenors in said suit, who were plaintiffs, both as against Niles & Co. and Broadwell, syndic of Knox, and citations were issued and served on Niles & Co. and Broadwell to appear in this court upon the return of the writ of error. It will be seen, from this statement, that Payne & Harrison were not parties to the judgment in the suit of Niles & Co. v. Knox. The only judgment in the circuit court to which they were parties was the judgment dismissing their petition of intervention, and Knox was not made a party defendant in that proceeding, nor was he a party to that judgment. The order of the court to make Broadwell, his syndic, a party, was passed after this judgment was rendered.

§ 1604. *No one who was not party to the judgment can be either plaintiff or defendant in writ of error. (a)*

Writs of error to remove the judgment of an inferior tribunal to this court are, under the acts of congress, governed by the principles and usages of the common law. And it is very well settled in all common law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court. Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co. and Knox, to which they were not a party, nor can they make Knox or his representative a defendant in a writ of error brought upon the judgment on the petition of intervention, to which neither Knox nor Broadwell, his syndic, was a party. This writ of error attempts to do both, and is therefore not warranted by law. It cannot bring the judgments referred to, or either of them, before this court, and must therefore be dismissed, with costs.

TERRY v. ABRAHAM.

(3 Otto, 38-41. 1876.)

APPEAL from U. S. Circuit Court, Southern District of Georgia.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—On the 12th day of July, 1869, Harvey Terry, the appellant, filed his bill in the circuit court for the southern district of Georgia, against the Merchants' and Planters' Bank and Hiram Roberts. The bill purported to be brought in behalf of plaintiff and all others in like condition with himself who would unite and contribute to the expenses of the proceeding. It sets out as the foundation of plaintiff's rights that he is the owner and holder of a considerable amount of the circulating notes of the bank; that the bank, since 1866, has been insolvent, and refused to redeem its bills; and that, on the 18th day of July of that year, it had made to Hiram Roberts, the other defendant, a general assignment of its effects for the benefit of its creditors. This assignment is set out in full as an exhibit to the bill. It is alleged that Roberts has wholly failed to execute the trust; and the relief sought is, that a receiver may be appointed, who shall take charge of the property so assigned,

(a) One who was not a party to the proceeding, nor treated as such, but who was heard in the lower court as a matter of favor, without showing any interest in the controversy, is not entitled to an appeal. *Ex parte Cockcroft*,* 14 Otto, 578.

and who shall administer and close up the affairs of the trust, and distribute the effects among the creditors, as they may be found justly entitled. A receiver was appointed in accordance with the prayer of the petition, with directions to take possession of the assets of the bank, and to collect its debts; and a master was appointed to ascertain and report the names of all the creditors entitled to share in the fund, and the amount to be distributed to each of them.

§ 1605. *Where an appellant does not make parties to his appeal those interested in maintaining the decree, he can obtain no relief here detrimental to their interests.*

It is on the exceptions taken by the appellant to this report that the only questions arise which this court can notice. There are seven of these exceptions, the second and third of which alone relate to allowances made by the master to creditors represented by Stone and Akerman as attorneys in the case. The other exceptions relate to allowances in favor of other creditors, who are not parties to this appeal. The appellant, in taking his appeal, expressly limited it to the creditors represented by Stone and Akerman, and procured an order of severance as to the others, and the allowance of the appeal as between appellant and those parties alone. Conceding the appeal to be good as to these parties and the issues between them (which is a little doubtful), it is very clear that no modification of the decree can be had here to the prejudice of those who were parties below and are not parties here. This principle disposes also of the alleged error of the court in refusing to allow a reasonable compensation for services of plaintiff's attorney, to be paid out of the general fund before distribution. As appellant had instituted the suit and carried it on at his own expense until he procured a decree for distribution of a large fund, in the benefit of which all the creditors participated, we see no good reason why the fund thus realized and distributed should not have been chargeable with the expense incident to the proceeding. But there may have been a good reason for it; and, if the creditors who shared in the distribution were here as parties, they might be able to sustain the action of the court below. At all events, as no order on the subject could now be made without disturbing their rights under the decree, and as appellant has not thought proper to bring them here, the decree cannot be changed on that subject.

§ 1606. *Appellant estopped to assign error.*

The third exception, which relates to the parties represented by Stone and Akerman, questions an allowance of interest on their claims. The sufficient answer to this is that appellant claimed and received interest on his claims in precisely the same manner, which made these parties equal in the matter, and which estops appellant from alleging the action of the court to be error.

§ 1607. *An appellant cannot have a decree reversed because other parties have received allowances of the same kind that he received, all the parties being creditors of equal degree, and the objection being raised for the first time here.*

The second exception is founded on the allegation contained in it that the creditors represented by Stone and Akerman, whose claims to the amount of \$832,115.76 had been allowed, had, after the assignment, collected from the stockholders of the bank, by legal proceedings, the sum of \$197,672 "in the aggregate;" and he raises two points on this part of the master's report: 1st. That these parties should have been allowed nothing at all out of the fund now in court. 2d. That they should have only been permitted to share in the fund after all the other creditors had been made equal by receiving as much in

proportion as these had collected by law. There are several reasons why these exceptions cannot be sustained here. One of these is that the sum mentioned as realized by the twenty-three creditors represented by Stone and Akerman is stated in the aggregate; and there is no averment of the amount received by each creditor, or that in point of fact each one of the twenty-three received a part of this sum. It is perfectly consistent with the language of the exception that one or two or three of the claimants represented by these attorneys received the whole amount mentioned. Another objection is that the record shows that appellant himself had in like manner proceeded at law, and had collected a considerable sum, just in the same manner as these creditors had; and if their action debarred them from any benefit of the trust funds, he was in like manner debarred, and has no standing in court. Again: though the exception alleges that the money so made by these creditors was realized out of the unpaid stock, by which is probably meant that part of the stock subscribed for and not paid in, the record leaves it in doubt whether it was not collected of stockholders on account of the personal liability which the statute imposed on the shareholder outside of his liability to pay on the stock actually subscribed, with a strong probability that the statutory liability was the principal source of the money so collected. We are of opinion that the assignment did not carry this statutory liability to the assignee, and that, as the purpose of this bill was to enforce the assignment, and nothing else, the amount received from other sources had no other effect on the rights of creditors than to diminish the amount of their debts on which the dividend was to be estimated. A circumstance quite as strong against the appellant is that, though he had, as plaintiff, the control of the management of this suit, he took no steps to have the unpaid stock collected, had no order made for its payment by the shareholders, nor any directions to the receiver to enforce its payment. No other creditor took any step in that direction. Neither the receiver, the other creditors, nor the appellant, have in any manner, up to the argument in this court, looked to that source as part of the fund to be distributed under this assignment.

Under all these circumstances, we hold that, if any right to collect this unpaid stock passed to the assignee, of which there is great doubt, the parties to this suit have waived and abandoned that right, and the appellant cannot now set it up to reverse this decree.

Decree affirmed.

THE PROTECTOR.

(11 Wallace, 82-88. 1870.)

APPEAL from U. S. Circuit Court, Southern District of Alabama.

§ 1608. *All the parties to an appeal must be named.* (a)

Opinion by MR. JUSTICE NELSON.

The motion made by the appellees to dismiss the case from the docket for want of jurisdiction is grounded upon a defect of the title of the parties in the appeal as allowed. The title is, "William A. Freeborn & Co. v. The Ship Protector and owners." This defect in a writ of error has been held fatal to the jurisdiction of the court since the case of *Deneale et al. v. Stump's Executors*, 8 Pet., 526, down to the present time. *The Heirs of Wilson v. The Life and Fire*

(a) A writ of error reciting that the proceedings are between certain parties *and others* is fatally defective. *Miller v. McKenzie*,* 10 Wall., 582. Writ of error dismissed because it did not name all the parties. *Smyth v. Strader*,* 12 How., 327. A writ of error, in which the plaintiffs were described as *the heirs* of a certain party, dismissed. *Wilson v. Life and Fire Ins. Co.*,* 12 Pet., 140.

Insurance Company of New York, 12 id., 140; *Smyth v. Pevine & Co.*, 12 How., 327; *Davenport v. Fletcher*, 16 id., 142. Nor can the writ be amended, according to repeated decisions of this court. *Porter v. Foley*, 21 How., 393; *Hodge et al. v. Williams*, 22 id., 87. The only question before us is whether the same rule applies to appeals in admiralty. Originally, decrees in equity and admiralty were brought here for re-examination by a writ of error, under the twenty-second section of the judiciary act. This was changed by the act of March 3, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty and prize; but the act provides "that the appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error."

In *Owings et al. v. Andrew Kincannon*, 7 Pet., 403, the appeal was dismissed because all the parties to the decree below had not joined in it. Chief Justice Marshall, in delivering the opinion of the court, referred to the case of *Williams v. The Bank of the United States*, 11 Wheat., 414, which was a writ of error, where it was held that all the defendants must join, and applied the same rule to the case of an appeal. He cited the act of 1803, and observed that "the language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error." But the case of *Francis O. J. Smith, appellant, v. Joseph W. Clark et al.*, 12 How., 21, is more direct to the point before us. It was a motion to docket and dismiss in the case of an appeal, under the forty-third rule of the court. The certificate of the clerk, upon which it was founded, described the parties as in the title above. Chief Justice Taney, in giving the opinion of the court, stated that the certificate conformed to the rule in all respects but one, and that was in the statement of the parties. The respondents were stated to be *Joseph W. Clark and others*, from which it appeared that there were other respondents, parties to the suit, who were not named in the certificate. He then referred to the case of a writ of error (*Deneale v. Stump*, 8 Pet., 526), where it was held that all the parties must be named in the writ, and the name of one or more of them, *and others*, were not a sufficient description; and also to the case of *Holliday et al. v. Baston et al.*, 4 How., 645, where the same principle was applied to a writ of error docketed under the forty-third rule, and observed the same reason for requiring all the parties whose interests were to be affected by the judgment, to be named in the writ of error, applied with equal force to the case of an appeal from a decree. And the motion to docket and dismiss for the above defect was overruled. The opinion of the court in the present case is, that no distinction in respect to the question before us can be made between the case of an appeal under the act of 1803, and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation and bond, and also the motion to amend the libel.

Motion to dismiss granted.

JUSTICES SWAYNE and BRADLEY dissented, holding that the defect was amendable.

STEAMBOAT BURNS.

(9 Wallace, 237-240. 1869.)

ERROR to the Supreme Court of Missouri.

STATEMENT OF FACTS.—The writ of error in this case was brought in the name of the steamboat. It recited a judgment between the Steamboat Burns, etc., in which “a manifest error hath happened, to the great damage of the said steamboat, her tackle,” etc.

§ 1609. *A writ of error must be brought in the name of a person or a corporation.*

Opinion by MR. JUSTICE MILLER.

It is believed to be the first time that anything but a human being, or an aggregation of human beings, called a corporation or association, has attempted to bring a writ of error or appeal in this court. It is said in support of the writ that the proceeding below was *in rem* against the steamboat by name, and that as it was so conducted through all the state courts it should be so here. There is nothing in the essential nature of proceedings *in rem* which justifies or requires this. Whenever the *res* is seized in admiralty proceedings proper, or in revenue or other proceedings partaking of that character, the property is condemned and sold, and with the distribution of the proceeds the case ends, unless some one appears in court as claimant either of the *res* or its proceeds. When a claimant appears he becomes a party to the proceedings, and may defend, take an appeal or writ of error, or adopt any other proceeding that a party properly before the court may be entitled to. It is true that in placing such cases on the dockets of our courts, and in the reports of our decisions, the name of the vessel or thing seized is often retained; but in all cases where any defensive action is taken, some person must appear and claim an interest or a right to be heard on account of his relation to the property.

§ 1610. *The states cannot confer upon an inanimate object the right to sue or to be sued in the federal courts.*

It is said that the statute of Missouri allows the steamboat to be sued by name, and allows a defense to be made by the owner in the name of the vessel. But the states cannot in this manner confer on an inanimate object, without sense, or reason, or legal capacity, the right to prosecute legal proceedings in the federal courts. Nor does the statute under which these proceedings were had in the state court present any difficulty to a party interested in the boat, in asserting his rights. Section 12 of the steamboat law (1 Rev. Stat. of Mo., 306) provides that the owner, captain, agent, consignee, or any creditor of the boat, may appear to the action, on behalf of the boat or vessel, and plead thereto and defend the same; and though it has been the practice to do this in the name of the vessel, it has never been held, nor do we suppose it ever will be by the state courts, that an owner cannot appear in his own name and assert his rights in the vessel. Section 38, however, relieves the matter of all embarrassment, and shows that the framers of the statute seemed to think as we do, that when an appeal or writ of error was to take the case to a higher court, it should be by some person who asserted an interest in the vessel. With the liberal provision which that section makes for review of the judgment, there can be no necessity that we shall so far violate reason and law as to permit a steamboat to bring a suit here by writ of error. If any person or corporation whom this court can recognize as a legal entity, capable of sustaining a suit in this court, has an interest in such a controversy, that party must con-

nect himself with the case in such a manner as to enable himself to assert his rights here. It cannot be done in the name of a steamboat. An examination of the records in these cases shows that Adolph Heinecke did in the inferior court claim to be the owner, and defended the suit in the name of the steamboat. He likewise made affidavit that he was the owner, and gave bond to enable him to appeal to the supreme court of the state. But instead of taking the appeal in his own name he took it in the name of the steamboat. We are of opinion that by a liberal construction of the record he may be so far regarded as claimant and party to the record as to enable him to bring a writ of error to this court in his own name if he shall be so advised. The present writs are dismissed.

TODD v. DANIEL.

(16 Peters, 521-524. 1842.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the district of Maine, in a suit in equity, in which the appellants were the original defendants. After the decree was made, an appeal was claimed by all the defendants, and allowed by the court. A part of the defendants, who originally claimed the appeal, before any further proceedings, abandoned their appeal; and the residue of them, excepting Todd, have, since the session of this court, abandoned their appeal, and Todd only has entered his appearance. But the record stands in the names of all the defendants as parties appellant. Under these circumstances, the counsel for the appellee has moved the court to dismiss the appeal for irregularity and want of jurisdiction, upon the ground that it cannot be maintained on behalf of Todd alone.

§ 1611. *Where part of the appellants abandon an appeal, the others may proceed.*

There is no doubt that the appeal having been deserted by all the original defendants except Todd, it must be dismissed, with costs, as to them. But as to Todd, very different considerations must arise. He seeks to reverse the decree in the court below, as erroneous in regard to himself; and the question is whether he is not entitled to maintain the appeal separately, for his own interest, although it is deserted by all the other defendants. We think that he is, otherwise an irreparable injury might be inflicted upon him by an erroneous decree, for which the law would not afford him any redress. The decree in this case is in fact against him as principal, and against the other defendants in aid of him, for distinct portions of the purchase money received by them under the contract of sale made by Todd, and stated in the bill and answer. The decree may be entirely right in regard to the other defendants, and yet it may be erroneous as to Todd. He has, or at least may have, a distinct and independent interest in the controversy, in respect to which he is entitled to be heard in this court.

§ 1612. *The rule as to appeals from joint decrees.*

The proper rule in cases of this sort, where there are various defendants, seems to be, that all the defendants affected by a joint decree (although it may be otherwise where the defendants have separate and distinct interests, and the decree is several, and does not jointly affect all) should be joined in the appeal; and if any of them refuse or decline upon notice and process (in the nature of a summons, and severance in a writ of error) to be issued in the court below, to become parties to the appeal, then that the other

defendants should be at liberty to prosecute the appeal for themselves and upon their own account; and the appeal as to the others be pronounced to be deserted, and the decree of the court below as to them be proceeded in and executed. In the present case, what has occurred is equivalent to such proceedings. All the defendants originally claimed an appeal; some of them have declined to pursue it at all; others have deserted it since it was pending in this court; and, therefore, there is no pretense to say that any practical inconvenience can occur from Todd's now prosecuting it alone, and since the other defendants have all had notice and declined to interfere, and are content to abide by the original decree.

In the case of *Coxe and Dick v. The United States*, 6 Pet., 172, no doubt was entertained by this court that a writ of error might be entertained by the defendants severally, where the judgment operated, under the laws of Louisiana, as a several as well as joint judgment, although they might have united in the writ of error; and if any one choose not to prosecute it, the others might, upon a summons and severance, proceed alone. The case of *Owings v. Kincannon*, 7 Pet., 399, seems to have been misunderstood at the bar. The objection in that case was not that one or more of the defendants might not pursue an appeal for their own interest, if the others refused to join in it upon due notice and process for that purpose from the circuit court; but that it did not appear that all the defendants were not ready and willing to join in the appeal, and that the appeal was brought by some of the appellants without giving the others an opportunity of joining in it, for the protection of their own interest, not only against the appellee, but against the appellants, as their own interests might be distinct from, or even adverse to, that of the appellants; and it was right and proper that all the parties should have an opportunity of appearing before the court, so that one final decree, binding upon all the parties having a common interest, might be pronounced.

Upon the whole, therefore, our opinion is that the appeal must be dismissed, with costs, against all the defendants except Todd; and as to him, it is to be retained for a hearing upon the merits.

BLOSSOM v. RAILROAD COMPANY.

(1 Wallace, 655-657. 1863.)

APPEAL from U. S. District Court, District of Wisconsin.

STATEMENT OF FACTS.—Certain property was offered for sale under a decree foreclosing a mortgage; the appellant bid, the sale was then suspended, and no further proceedings were had. An application by the appellant to have the sale completed and confirmed was overruled, and he appealed. Motion to dismiss.

Opinion by MR. JUSTICE MILLER.

1. Is the appellant so far a party to the original suit that he can appeal?

§ 1613. *Bidder at a marshal's sale may appeal from decision of the court as to confirmation.*

It is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of

the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation which the court is bound to protect. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances. So in the case of a creditor's bill, or other suit, by which a fund is to be distributed to parties, some of whom are not before the court; these are at liberty to come before the master after the decree, and establish their claims to share in the distribution. A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to. In *Delaplaine v. Lawrence*, 10 Paige, 602, Chancellor Walworth says that "in sales made by masters under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having inchoate rights which entitle them to a hearing upon the question whether the sales shall be set aside. And if the court errs, by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." This principle, to which we see no objection, seems to decide the point before us in regard to parties to the suit.

§ 1614. *An appeal may lie from matters arising after the decree.*

2. The next ground assumed is that the right of appellant having accrued in the mere process of executing the final decree of the court, no appeal lies in such case. Although this court has frequently decided that where the act complained of was a mere ministerial duty, necessarily growing out of the decree which was being carried into effect, no appeal would lie, it has never decided that in *no* case arising after a decree, which is final only in the sense which would allow it to be appealed, will an appeal be allowed from an order of the court, however it might affect important interests, or decide matters not before the court when the first decree was rendered. Such a doctrine would place a very large proportion of the most important matters adjudged by courts of chancery beyond the reach of an appeal. On the contrary, this court has repeatedly considered appeals from the decrees of the circuit courts upon matters arising after the case had been here, and the courts below had entered decrees in accordance with the directions of this court. At the present term, in the case of *A. R. Orchard v. John Hughes*, the court refused to dismiss an appeal from an order confirming a sale under a decree of foreclosure, and directed that the case should be heard, with the appeal from the principal decree in the suit which ordered the sale.

§ 1615. *An appeal will not be dismissed where the decision of the motion involves the merits.*

3. It is said that the act of the court in refusing to confirm or complete the sale was entirely within its discretion, and, therefore, cannot be reviewed here. The case of *Delaplaine v. Lawrence*, just cited, seems to imply a different doctrine. However this may appear on investigation, we think that its decision involves the merits of the case before us, and requires such an examination of the whole record as can only be made fairly on a full hearing. We are not disposed to deprive the appellant of this by dismissing his appeal on motion.

Motion overruled.

HINCKLEY v. GILMAN, CLINTON AND SPRINGFIELD RAILROAD COMPANY.

(4 Otto, 467-469. 1876.)

APPEAL from U. S. Circuit Court, Southern District of Illinois.

STATEMENT OF FACTS.—In this case property was sold and conveyed under a decree foreclosing a mortgage, and on a settlement with the receiver, a decree was entered against him, directing the payment into court, by a certain time, of a balance found due from him. He appealed from the decree, and a motion was made to dismiss because he was not a party to the suit.

Opinion by WAITE, C. J.

The motion to dismiss cannot be sustained. In *Blossom v. Railroad Company*, 1 Wall., 655, a bidder at a foreclosure sale was allowed to appeal, and in delivering the opinion of the court Mr. Justice Miller said: "It is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation which the court is bound to protect."

§ 1616. *A receiver may appeal from a decree requiring him to pay a balance into court.*

This seems to us to be decisive of this motion. The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. In this case the final decree has been given and the case is properly here upon the appeal as prayed and allowed. This will not keep anything in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. Everything can be closed up in the court below, in accordance with the decree which has been entered in the cause, except the distribution of the money claimed from the receiver.

It will be time enough to consider whether more of the record has been brought here than is necessary to the hearing of the questions presented by the appeal when the cause is reached, or when application is made to us in that behalf.

Motion to dismiss denied.

CONNOR v. PEUGH.

(18 Howard, 394-396. 1855.)

ERROR to U. S. Circuit Court, County of Washington, District of Columbia.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—Defendant in error moves to dismiss the writ of error in this case. It is an action of ejectment brought in the circuit court of this District in the usual form, by serving a declaration on the tenant in possession with notice. The declaration and notice were served by the marshal more than

ten days before March term, 1854. The tenant did not appear and have herself made defendant in place of the casual ejector, according to the exigency of the notice; and at October term a judgment was entered against the casual ejector in the usual and proper form. On the 5th of June, 1855, the tenant in possession came into court for the first time and moved to set aside the judgment and execution issued thereon, and to be allowed to defend the suit for reasons set forth in her affidavit. The court refused to grant this motion, "whereupon the said Mary Ann Connor prayed an appeal," etc.

§ 1617. *Where a tenant does not become a party to an ejectment, he cannot appeal from a judgment against the casual ejector.*

The tenant in possession having neglected to appear and have herself made defendant, and confess lease, entry and ouster, the judgment was properly entered against the casual ejector. No one but a party to the suit can bring a writ of error. The tenant having neglected to have herself made such, cannot have a writ of error to the judgment against the casual ejector.

§ 1618. *An appeal does not lie from a decision of a motion to set aside a judgment and to permit the party to intervene.*

The motion afterwards made to have the judgment set aside, and for leave to intervene, was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is it the subject of a bill of exceptions or writ of error.

Writ of error dismissed.

§ 1619. **Who may appeal.**—Persons made parties to the suit by order of the court in a real action, and against whom judgment is rendered for want of a plea, may obtain a review of the judgment by a writ of error. *Macker v. Thomas*, 7 Wheat., 531. Pending a suit in equity against a levee board consisting of five commissioners, such board was abolished and the state treasurer and auditor were *ex officio* constituted such board, and substituted for the former commissioners. The suit was revived and decree rendered against them. *Held*, that an appeal by them in their own names as treasurer and auditor, "and *ex officio* levee board," etc., was proper. *Hemingway v. Stansell*, 16 Otto, 401.

§ 1620. A writ of error in which a bank is plaintiff in error will not be dismissed because its charter expired pending the hearing, though by the terms of the charter it was to cease on a certain date, but was to possess the power to settle up its affairs thereafter. *Pomeroy v. Bank of Indiana*, 1 Wall., 25.

§ 1621. No appeal can be taken from a decree in admiralty *in rem* in the name of the *res*; nor, it seems, in the name of other than human beings, or a corporate or aggregate association of human beings. It seems also that a person not a party to the record cannot appeal, and that an appeal in a firm name is improper unless the names of the individual members appear. *Steamer Spark v. Lee Choi Chum*, 1 Saw., 716. See § 1598.

§ 1622. Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree, and he has no right to an appeal although the right is reserved in the decree. *Farmers' Loan and Trust Co. v. Waterman*, 16 Otto, 265. See the case, §§ 572, 573. See §§ 1595, 1602.

§ 1623. **Describing the parties.**—An appeal will not be dismissed if it appears that it was granted to the defendants, although they are not named. *Adams v. Law*, 16 How., 60. See § 1597.

§ 1624. Where there were but three plaintiffs in error, and the citation described four, and in one citation the names were different from those in the writ of error, and the bond given in each case recited but one person as plaintiff in error, the writs were dismissed. *Kail v. Wetmore*,* 6 Wall., 451.

§ 1625. The supreme court, on an appeal from a decree of the circuit court, in which the orders of a state court in a concurrent proceeding are sent up with the record, cannot infer from the title of the cause, in which "*et al.*" follows the names of the defendants, that a person not named or referred to therein was a party, against his denial in the suit in the circuit court. *Williams v. Bankhead*, 19 Wall., 570.

§ 1626. A writ of error to review a judgment upon *scire facias* against several persons is irregular when brought in the name of one "and others." All the parties interested must join, and their names must appear. *Deneale v. Archer*, 8 Pet., 526.

§ 1627. All parties must join.—Less than all the parties to a joint decree cannot appeal without a summons and severance in the court below. *Ex parte Mussina*, 20 How., 289. See the case, §§ 63, 64. See § 1594.

§ 1628. Where only one party to a joint decree appeals, the appeal will be dismissed. *Clifton v. Sheldon*,* 23 How., 481; *Doty v. Strong*,* 1 Pin. (Wis.), 167. Where only one party appeals, if the appeal brings up so much of the case and such of the parties as are necessary for a determination of his rights, the appeal will not be dismissed. *Milner v. Meek*,* 5 Otto, 258.

§ 1629. Where a joint and several judgment is rendered against several defendants, they may separately sue out writs of error. *Cox v. United States*, 6 Pet., 178.

§ 1630. A defendant in equity, who has a separate interest, may appeal without joining the other defendants. *Forgay v. Conrad*, 6 How., 203 (§§ 340-342); *Brewster v. Wakefield*, 22 How., 128.

§ 1631. It seems that in an action for a marine trespass against two, if there is a joint decree for damages, either can appeal separately, if, by their plea, they have severed their interest, or have joined in pleading the general issue; but not if they pleaded a joint justification. *Thomas v. Lane*, 2 Sumn., 3.

§ 1632. Severance.—Where the record shows that written notice was served on co-defendants and that they refused to join in a writ of error, the writ will be sustained without the necessity of a summons and severance. (*Masterson v. Herndon*, 10 Wall., 418, cited.) *O'Dowd v. Russell*,* 14 Wall., 402.

§ 1633. If the defendant in error appears and defends the action, on a writ of error sued out by one of several of the original defendants without a request that the other defendants should be summoned and severed, he will be held to have waived such irregularity. *Amis v. Smith*, 16 Pet., 314.

§ 1634. It seems that where one of several defendants brings a writ of error in which the others are unwilling to join, he must do it in the name of all, and those who refuse to appear and assign errors must be summoned and severed, and then the writ of error must be proceeded in by the rest only; and the party who prosecutes the writ will not be compelled to proceed until they have been summoned and severed and the other parties will thus be forever after barred of the writ. As the practice of summons and severance is not common, the proper practice would be to enter a rule requiring all to join or be severed. *Doty v. Strong*,* 1 Pin. (Wis.), 167.

§ 1635. Intervention.—Persons may be permitted to become parties to a suit for the purpose of taking an appeal. *Sage v. Central R. Co.*, 3 Otto, 419. See the case, §§ 1493-98. In an action commenced in the district court of Louisiana to confirm a Spanish grant, a third person whose rights are barred under the act of congress allowing such actions cannot intervene in the appellate court and assert his title under the original action. *United States v. Patterson*, 15 How., 12.

§ 1636. In prize proceedings persons claiming to be interested in the property sought to be condemned, who were not parties to the proceedings in the courts below, and who consequently have no standing in the supreme court, either as appellants or as appellees, will not be allowed, on appeal, to intervene, for the reason that to allow such intervention would be to exercise original instead of appellate jurisdiction. *The William Bagaley*, 5 Wall., 411.

§ 1637. After a decree of foreclosure taken *pro confesso*, certain parties asked and obtained leave to intervene in the suit in the same manner and with a like effect as if they had been named in the original and supplemental bills. Afterwards the case was referred to a master, to whose report the intervenors excepted. The report was followed in the final decree, and, deeming themselves aggrieved, the intervenors claimed an appeal, which the court below refused to grant. *Held*, that the intervenors had a right to appeal, and that *mandamus* would lie to the circuit court to enforce it. The allowance of an appeal follows of course if prayed for by one who has a right to it, and the words of the statute, "shall be allowed," are imperative. *Ex parte Jordan*, 4 Otto, 251.

§ 1638. Where the supreme court reversed a decree and remanded the case for the lack of averments in the bill which would enable it to dispose of the case, with directions to allow the proper amendment, and it was suggested that there were other persons who should be made parties, but whose application to the court below was refused because not made in time, the supreme court directed that they be added as parties. *Harrison v. Nixon*, 9 Pet., 505.

§ 1639. Rights of parties not appealing.—Parties who do not appeal from a final decree of a circuit court, which is regular in form, cannot be heard in opposition to the decree when the cause is removed to the supreme court by the opposite party, unless it appears that the proceedings in removing the cause were unauthorized and irregular. They may be heard in support of the decree, and in opposition to every assignment of error filed by the appellants. *The Stephen Morgan*,* 4 Otto, 599; *Mount Pleasant v. Beckwith*, 10 Otto, 527.

§ 1640. On appeal to the supreme court the appellee can ask nothing but what the decree appealed from gave him. It is the appellant who complains of the decree, and only such questions will be examined as are presented by him. The position of the appellee is defensive simply. It is only when both parties appeal that the cause is open for examination as it is in the lower court. *Canal Company v. Gordon*, 6 Wall., 568.

§ 1641. On an appeal from the decree of the circuit court in a suit in equity the supreme court can know no parties except those to the record, and will permit no one who may deem himself interested to appear by counsel and interfere. *Harrison v. Nixon*, 9 Pet., 492.

§ 1642. Where both parties to a decree appeal, and one appeal is dismissed for want of prosecution, the other party can only be heard in support of the part of the decree covered by the appeal dismissed. An appeal brings up only what was decided adversely to the appellant. *Loudon v. Taxing District*, 14 Otto, 774.

§ 1643. In the supreme court the party not appealing cannot take advantage of an error in the decree against himself; nor, it seems, can the appellants allege error in the decree against the appellees. If the appellees desire to avail themselves of error in the decree of the court below they must take a cross appeal, or they must be held to have waived the error. *Chittenden v. Brewster*, 1 Wall., 196.

§ 1644. After an appeal has been dismissed by stipulation of the parties, in a case involving a survey under a Mexican grant, in which the appellant in the record was the United States simply, such dismissal will not be vacated upon the application of parties whose names do not appear of record as parties to the case, even though it may appear that private parties interested in the lands were prosecuting under the name of the government. *United States v. Estudillo*, 1 Wall., 715.

§ 1645. The United States, in a proceeding to confirm a title to a Mexican grant, if they do not appeal from the order of the district court confirming a survey made in such proceedings, will not be heard in the supreme court to question the correctness of the survey. *Alviso v. United States*, 8 Wall., 342; *The Fossat Case*, 2 Wall., 704.

§ 1646. The supreme court, upon an appeal from a decree in an admiralty proceeding, will not take into consideration the interests of parties not appealing. *M'Donough v. Dannery*, 3 Dal., 189. Such parties will only be heard in favor of the decree. *The Slavers (Reindeer)*, 2 Wall., 394. The rule applies in collision cases. *The Quickstep*, 9 Wall., 672.

§ 1647. Under the judiciary act of 1789, and acts amendatory thereof, both parties in an admiralty suit may appeal from the decree of the court below; but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard except in support of the decree from which the appeal of the other party is taken. *The Maria Martin*, 12 Wall., 40.

§ 1648. A libel was filed in the district court against a tug and her tow for damages resulting from a collision. Before entry of the decretal order in the suit, the owners of the vessel filed a paper in court, by which they agreed to take upon themselves the entire defense of the suit, both in their own behalf and in behalf of the tug, and promised to pay the libelants whatever damages might be assessed against the tug. The decree of the district court being against the claimants, the owners of the vessel appealed from the whole decree. On appeal to the supreme court by the owners of the tug, the court intimates that although, as a general rule, a party who does not appeal cannot be heard against a decree, yet in this case the appeal of the owners of the tug was allowed, but the court suggests that there exist some well grounded doubts as to the regularity of the proceeding. *The Maby and Cooper*, 14 Wall., 214.

§ 1649. In case of the appeal to the supreme court by the owners of a steam tug, from a decree against such tug and its tow, rendered by the circuit court on an appeal by the owners of the tow alone from the decree of the district court against both tug and tow, the question whether the owners of the tug can appeal will not be considered by the supreme court where it appears that the decree against the tug must be affirmed. *Ibid.*

§ 1650. Defect of parties.— If, on appeal from the circuit court in an equity case, it appears to the supreme court that there is a defect of parties which will prevent a decree giving the proper relief, the cause will be remanded to the circuit court with directions to allow the necessary and proper amendments. *Lewis v. Darling*, 16 How., 8. It seems that the case may be remanded at any time before the final hearing. *West v. Smith*, 8 How., 410.

§ 1651. In a case appealed to the supreme court, where it appears that there is a defect of parties which will prevent the giving of a proper decree, the decree of the court below must be reversed, though such objection was not taken there, and the cause remanded to permit the proper and necessary amendments. *Hoe v. Wilson*, 9 Wall., 503.

§ 1652. It seems that although the objection of the want of proper parties may be made in the supreme court upon the hearing of an appeal, yet it should not prevail except in very

strong cases, and where the court perceives that a necessary and indispensable party is wanting. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 306.

§ 1653. **Landlord and tenant.**—Where a judgment in ejectment was recovered against a deceased tenant in Illinois, it was held that the landlord might sue out a writ of error in the name, and without the consent, of the heirs of the tenant; and especially as he became liable for the costs and expenses. *Kellogg v. Forsyth*,* 24 How., 186. See § 1602.

§ 1654. **Death of a party.**—It seems that if, after the death of a party to an action in a lower court, the other party wishes to obtain a review of the case upon a writ of error, he should petition the lower court for leave to revive the action in the name of the widow and heirs of the deceased; and that, if the inferior court should refuse such leave, he should apply to the supreme court for leave to issue the writ of error in the names of such representatives. *McClane v. Boon*, 6 Wall., 245.

§ 1655. Pending a writ of error to the supreme court, which was afterwards dismissed, one of the defendants in error died. Subsequently another writ of error was sued out, and the name of the deceased was included as one of the parties. *Held*, that the writ was improperly brought, and must be dismissed on motion. *Ibid*.

§ 1656. **Assignee in bankruptcy.**—Where a writ of error was sued out by three partners, two of whom were bankrupts, and a motion was made to dismiss the writ on the ground that it could only be prosecuted by the assignee of the bankrupts, and such assignee had petitioned to be substituted, the order of substitution was made, and the assignee was allowed to prosecute the writ in behalf of the bankrupts. It seems that in such a case the solvent partner might prosecute the writ himself, using, if necessary, the names of the bankrupts. *Gates v. Goodloe*, 11 Otto, 613. See, also, §§ 51, 83.

XIII. CITATION.

SUMMARY—*Citation or waiver necessary*, § 1657.—*Appeal taken after adjournment*, §§ 1658, 1660.—*Security taken after the term*, § 1659.—*Notice by publication*, § 1661.—*Signed by clerk*, § 1662.—*Service on attorney or executrix*, § 1663.—*Service where a state is a party*, § 1664.

§ 1657. A citation, with due return, or a waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. *Alviso v. United States*, § 1665. See §§ 1678, 1681.

§ 1658. The act of 1803 subjects appeals from decrees in chancery to the rules and regulations which govern writs of error. Under that act, where the appeal is taken after the court has risen a citation is necessary, and it must be served thirty days before the return day of the appeal or writ of error. *Yeaton v. Lenox*, §§ 1666, 1667.

§ 1659. Where security is taken after the term, the citation must be served even though the appeal was taken in open court. *National Bank v. Omaha*, § 1668.

§ 1660. Service of the citation is necessary where the appeal is taken out of term. An omission, however, will not avoid the appeal, but the court may grant summary relief by imposing such terms upon the appellants as under the circumstances may be legal and proper. *Dayton v. Lash*, § 1669.

§ 1661. Where a party appears and litigates his rights in the lower court, a judgment against him on writ of error, with notice by publication, is binding, where such process is authorized by the statute, and is evidence against him of the value of slaves in controversy. *Nations v. Johnson*, §§ 1670-1674.

§ 1662. Where the citation is signed by the clerk instead of by the judge, the writ of error will be dismissed. *United States v. Hodge*, § 1675. See §§ 1685, 1697.

§ 1663. Service of citation on the attorney or counsel of record of the proper party is sufficient; but service on his executrix or law partner is not sufficient, and where such service was made the writ of error was dismissed. *Bacon v. Hart*, § 1676.

§ 1664. Where an officer of a state prosecutes for the state, the citation must be served on him. The tenth rule of the supreme court, requiring service on the chief executive magistrate and attorney-general of the state, applies to those cases only in which the state is a party on the record. *Poydras de la Lande v. Treasurer of Louisiana*, § 1677.

[NOTES.— See §§ 1678-1704.]

ALVISO *v.* UNITED STATES.

(5 Wallace, 824. 1866.)

APPEAL from U. S. District Court, Northern District of California.

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—The final decree in the district court was rendered on the 8th September, 1863, and an appeal was allowed, on motion of the claimant, on the 18th November, 1863. Upon this appeal no action was taken by the appellants. On the 23d February, 1864, an appeal was again allowed, and the record was brought to this court and filed, November 11, 1864.

§ 1665. *Citation necessary to confer jurisdiction. (a)*

This was in time, but no citation was issued to the adverse party, and there is nothing to show any waiver; and a citation, with due return, or waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. The writ, therefore, must be dismissed.

YEATON *v.* LENOX.

(7 Peters, 220-222. 1833.)

APPEAL from U. S. Circuit Court, District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—In this case a decree was pronounced by the court of the United States for the county of Alexandria, in December, 1829, from which the defendants in that court appealed, but did not bring up the record. At January term, 1832, the appellees, in pursuance of a rule of this court, brought in the record, filed it, and moved that the suit should be dismissed. The court ordered a dismissal. On the 9th day of March, 1832, a citation was signed by the chief justice of the court for the District of Columbia, citing the plaintiffs in the original action to appear before the supreme court, then in session, and show cause why the decree of the circuit court should not be corrected. A copy of the record was returned with this citation "executed," and filed with the clerk. The appellees move to dismiss the suit because the record has been irregularly brought up.

§ 1666. *A citation is necessary where the appeal is taken after the court has risen.*

The act of March, 1803, which gives the appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. Under this act it has been always held that a decree may be prayed in court when the decree is pronounced; but if the appeal be prayed after the court has risen, the party must proceed in the same manner as had been previously directed in writs of error.

§ 1667. *The citation must be served thirty days before the return day of the appeal or writ of error. (b)*

The judicial act directs that a writ of error must be allowed by a judge, and that a citation shall be returned with the record; the adverse party having at

(a) In *Innerarity v. Byrne*,* 5 How., 295, it was held that the citation was not necessarily a part of the record; that the presumption is that one was issued when the writ of error was allowed, and that it may be proved *aliunde*. In *Pierce v. Cox*,* 9 Wall., 786, it was held that the appellant could not dismiss the appeal for want of a citation, the appellee being in court, and making no objection to the want of a citation. In the case of *Alviso v. United States*, *supra*, the appeal was dismissed for want of a citation, but at the next term, on its being shown that a citation was signed and served, and filed with the clerk, and was afterwards lost in a fire which destroyed the clerk's office, the court held that the case was not a proper one for a *certiorari*, and reinstated the appeal. *Alviso v. United States*,* 6 Wall., 457.

(b) In the case of *Lloyd v. Alexander*,* 1 Cr., 365, the court said that the change in the sessions of the courts since that statute was passed made it difficult to form a rule for the service of citations, and held that "at present,

least thirty days' notice. This notice, we understand, is thirty days before the return day of the writ of error. In this case the appeal is not allowed by the judge, and the citation is to appear before the court then sitting. The record is brought up irregularly, and the cause must be dismissed.

NATIONAL BANK *v.* OMAHA.

(6 Otto, 737, 738. 1877.)

APPEAL from U. S. Circuit Court, District of Nebraska.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The decree in this case was rendered November 13, 1874; and at the end appears the following entry: "Whereupon said complainant, by its solicitor, prays an appeal to the supreme court of the United States, which is allowed; and bond to be given on said appeal is fixed at \$500." A bond was filed September 30, 1875, which appears to have been approved by the clerk, and not by the judge. No citation has been issued or served, and there is no appearance in this court by the appellees.

§ 1668. *Citation must be served if security is taken after the term. Security must be approved by the judge.*

We have decided at the present term, in *Sage v. Railroad Company*, 6 Otto, 712, that, even though an appeal is asked for in open court, if the security is not taken until after the term, "a citation should be issued to bring in the parties, unless they voluntarily appear, for, until the security has been accepted, the allowance of the appeal cannot be said to have been perfected;" and, in *O'Reilly v. Edrington*, 6 Otto, 724, that "the security upon writs of error and appeals must be taken by the judge or justice. He cannot delegate this power to the clerk."

Appeal dismissed.

DAYTON *v.* LASH.

(4 Otto, 112, 113. 1876.)

APPEAL from U. S. Circuit Court, District of Minnesota.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—This record shows that an appeal was allowed, a *supersedeas* bond approved and a citation signed February 26, 1876; but it does not show a service of the citation, and the affidavits presented upon this motion fail to satisfy us that proper service was ever in fact made. The appeal was, however, duly obtained; and the record has been filed and the cause docketed here. We have, therefore, the record; but a service of the citation is necessary to bring the parties before us, as the appeal was taken out of term. We cannot proceed to hear and determine the cause until the parties are here, either constructively by service, or in fact by their appearance.

§ 1669. *Service of citation is necessary where the appeal is taken out of term. But a failure to serve the citation will not work a dismissal. (a)*

Perhaps the language of Mr. Chief Justice Taney, in *Villabolas v. United States*, 6 How., 90, and in *United States v. Curry*, id., 112, as well as of Mr.

if that citation has not been served thirty days, the court will not take up the case until the thirty days have expired, unless the defendant in error shall appear." And in *Welsh v. Mandeville*,* 5 Cr., 321, the citation was not served thirty days before the first day of the term, and the court refused to take up the case without consent, although thirty days had then expired, holding that the case of *Lloyd v. Alexander* only decided that the court will not take up the case until thirty days have expired since the service of the citation, and did not decide that the court would then take it up without consent.

(a) In *Railroad Co. v. Blair*,* 10 Otto, 661, the appeal was taken in court in the presence of the appellees, but at a term subsequent to the rendition of the decree, and no citation was served. The court, following the ruling in *Dayton v. Lash*, refused to dismiss the appeal, but ordered that unless the appellant serve a citation by a certain

Justice Nelson, in *City of Washington v. Dennison*, 6 Wall., 496, if read literally and without reference to the facts then under consideration, may be broad enough to justify a dismissal of this appeal, because the citation was not served before the first day of the term. But in the case of *Villabolos*, the real question was as to the validity of the citation, and not as to its service, if valid; in *Curry's* case the citation was not issued until after the term at which the appeal was returnable; and in *City of Washington v. Dennison*, the effort was to obtain a *supersedeas* in a case where the writ was not sealed until eleven days after the rendition of the judgment. None of the cases made it necessary to decide that a citation actually issued upon the allowance of an appeal must be served before the first day of the term, in order to preserve our jurisdiction; and we think that such an omission does not avoid the appeal, but rather furnishes a case where, under the rule in *Martin v. Hunter's Lessee*, 1 Wheat., 361, and followed in *Davidson v. Lanier*, 4 Wall., 454, we "may grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper." As this appeal was returnable to the present term, and some attempt was made to serve the citation, which the appellants may have supposed was actually completed, we order that, unless the appellants cause a new citation, returnable on the first Monday in February next, to be issued and served upon the appellee before that date, the appeal be dismissed.

NATIONS v. JOHNSON.

(24 Howard, 195-207. 1860.)

ERROR to U. S. District Court, Western District of Texas.

Opinion by Mr. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error to the district court of the United States for the western district of Texas. It was a petitory suit, commenced by the present defendants, and was founded upon a certain final decree rendered at the April term, 1854, by the district chancery court, held at Carrollton, in the state of Mississippi, for the northern district of that state. Among other things, the petitioners allege that Nancy A. Johnson, then Nancy A. Alvis, and a minor, by her next friend, brought a suit by bill of complaint in that court against the present plaintiffs to recover three slaves belonging to her, together with hire for the same for a specified time; that she subsequently intermarried with James Johnson, who was admitted with her to prosecute the suit; that the cause was afterwards submitted to the court for a final hearing, and a decree entered dismissing the bill of complaint at the cost of the petitioners. They also allege that they prosecuted a writ of error to the high court of errors and appeals in that state, and that the decree of the district court of chancery was there reversed and a decree entered in their favor. That decree, as set forth in the petition, shows that the appellate court was of the opinion that the slaves in controversy were the property and separate estate of the first-named complainant. Wherefore it was considered by the court that the decree of the vice chancellor ought to be reversed, and it was so ordered, adjudged and decreed; and the court proceeding to pronounce such decree as the subordinate court should have rendered,

time, the appeal be dismissed. In *Van Sant v. Gas-Light Co.*,* 9 Otto, 213, it was held that a citation becomes unnecessary only when the appeal is allowed in open court during the term at which the decree is rendered. This implies some action on the part of the court while in open session, and, to be regular, should be entered on the minutes; and the mere approval of the appeal bond by the chief justice during the term, not the act of the court, nor done while the court was in session, is not sufficient.

entered a decree that the complainants do have and recover of the respondents the slaves then in controversy, for the sole and separate use and right of the first-named complainant, and requiring the respondents to restore the slaves, and deliver the possession of the same to the said complainant, or her authorized agent. It is also recited in the decree that the court was of the opinion that the complainant was entitled to recover hire for the slaves from the time they were taken from her possession by the respondents. To carry out the directions of the court, it was further ordered, adjudged and decreed, that the cause be remanded to the subordinate court, and that an account be taken of the hire of the slaves, and for such other and further proceedings as may be required in the premises. After the mandate went down, the cause was sent to a commissioner to carry into effect the directions of the appellate court. He made a report, showing that on the 4th day of February, 1854, the reasonable hire for the slaves amounted to the sum of \$2,200; and he also reported that the hire of the slaves was reasonably worth \$200 per annum. That report was confirmed by the court, and on the 14th day of April of the same year a decree was entered in favor of the complainants, that they do have and recover of the respondents the said sum of \$2,200 with interest; and also, that they do have and recover of the respondents at the rate of \$200 per year for the hire of the slaves, from the date of the report until they shall be surrendered up according to the decree in the cause. As a part of the decree, it was also ordered and directed that execution issue, as at law, for the amount awarded to the complainants, together with the costs of suit. Plaintiffs also allege in their petition or declaration that those decrees or judgments were in full force, and that they have never in any manner been annulled, reversed, satisfied or discharged, either in whole or in part. Process was duly served upon the defendants in this case, and on the 5th day of December, 1854, they appeared and made answer to the suit. From the minutes of the clerk it would seem that the suit was entered, in the first place, as a suit at law, and it was certainly so treated by the defendants in their first answer. Those proceedings, however, are of no importance in this investigation, because the record states that on the 4th of December, 1856, the cause was docketed on the chancery side of the court; and on the 2d day of June, 1857, the defendants again appeared and filed their answer to the petition, without objection to the transfer which had been made of the cause. To that answer the plaintiffs excepted on various grounds, and after a full hearing the exceptions were sustained, and the answer was stricken out by the order of the court. Both parties again appeared before the court, sitting in chancery, on the 11th day of June, 1857, when, as the record states, "upon motion, and merits examined by the court, it was ordered that the cause be transferred to the law docket." No objection was made to that order by either party, and for aught that appears to the contrary, the transfer was made by consent. Leave was subsequently granted to the plaintiffs to amend their petition, and on the 26th day of January, 1858, they filed an amendment to the same alleging that they were citizens of the state of Tennessee, and that the defendants were citizens of the state of Texas. They also alleged in their amended petition that the slaves in controversy were of the value of \$3,200, and prayed judgment in their favor for the recovery of the slaves, and, in default of the delivery of the possession of the same, they also prayed judgment for their value, and "for general relief."

Exceptions were filed by the defendants to the amended petition, but the exceptions were overruled by the court. At the same time the defendants filed

an additional answer to the petition, denying all the allegations and charges therein contained, and also pleaded the statute of limitations in two forms, as set forth in the transcript. Afterwards, on the 6th day of February, 1858, the defendants had leave to plead *nul tiel record* to the respective decrees set forth in the plaintiffs' petition. On that issue the court found for the plaintiffs, and overruled the plea, and the parties went to trial upon the plea denying all the allegations and charges contained in the plaintiffs' petition, and upon the pleas setting up the statute of limitations. To support the issue on their part, the plaintiffs introduced duly certified copies of the two records and decrees set forth in their petition, and proved by competent witnesses the value of the slaves at the time of the trial. By that testimony it appeared that one of the slaves was of the value of \$800, and that the other two were each of the value of \$900. Defendants offered to prove that they removed from Mississippi on the 20th day of January, 1850; that they became citizens of Texas, and were domiciliated there on the 21st day of February of that year, and that they had ever since resided there as citizens of that state. That testimony was excluded by the court upon the objection of the plaintiffs, and the defendants excepted to the ruling. They offered no other evidence, and under the instructions of the court the jury returned their verdict for the plaintiffs. At the trial, the defendants requested the court to instruct the jury that, 1. The transcript from the record to the high court of error and appeals, and the chancery court for the northern district of the state of Mississippi, is not evidence sufficient to entitle the plaintiffs to recover. 2. That that portion of the decree of the chancery court fixing the hire of the negroes at \$200 a year, from and after the date of that decree, is no evidence of the value of the hire of said negroes; and unless the plaintiffs have introduced some evidence independent of that record, proving the value of the hire, the jury cannot allow hire from the date of the judgment rendered by the vice chancellor. But the court refused so to instruct the jury, and did instruct them that the record was conclusive proof that the title of the slaves was in the plaintiffs, and of the value of their hire up to the 4th day of February, 1854, as shown by the record; and the jury were also instructed to return a verdict in favor of the plaintiffs for the additional hire, at the rate of \$200 per annum, from the date of the decree. Instructions were also given to the jury as to the other matters of claim set forth in the petition; but inasmuch as they are not now made the subject of complaint, we shall pass the exceptions over without remark, except to say that they are evidently without merit.

§ 1670. *A judgment on writ of error, rendered on notice by publication, is binding when the notice is authorized by statute.*

On this state of the case three questions are presented for decision: 1. It is insisted by the plaintiffs in error that the court erred in charging the jury that the record offered in evidence was conclusive proof as to the title of the slaves in controversy, and of the value of their hire to the date of the decree. That theory is based upon certain facts which are apparent in the record of that suit, and the question is raised both by the instructions given to the jury and by the refusal of the court to charge as requested. It appears from the record of the suit that the bill of complaint was filed in the district chancery court for the northern district of Mississippi on the 26th day of November, 1846, and that the respondents entered their appearance on the 23d day of November, 1847, and made answer to the suit. Testimony was taken on both sides, and the respondents continued to prosecute their defense to the suit until

the 11th day of April, 1850, when, upon final hearing, the bill of complaint was dismissed at the cost of the complainants. Respondents' attorney then withdrew his appearance; but the record states that the complainants, on the same day, prayed an appeal, which was granted, upon their giving bond for costs in ninety days, "and by consent it is agreed" that the appeal be taken directly to the high court of errors and appeals. Complainants, however, failed to prosecute the appeal within the appointed time, and consequently were obliged to prosecute the appeal by writ of error. It is not now questioned that a writ of error, under the circumstances of the case, was the proper process, by the law of that state, for the removal of the cause into the appellate court; but it is insisted that the subsequent decrees are void, because the respondents were not legally notified of the pendency of the writ of error. Personal service was not made on either of the respondents, and they never appeared in the appellate court. On the contrary, it appears that the attorney of the complainants, on the 18th day of January, 1852, filed an affidavit in the cause that the defendants in error were not residents of the state, and that they had no attorney of record on whom process could be served. Provision, however, is made by the law of that state for service by publication in cases of this description. By the act of the 29th of January, 1829, it is provided that "whenever a cause shall be removed to the supreme court by writ of error, and the court is satisfied that the defendant in error is a non-resident, and has no attorney of record within this state, it shall be the duty of said court to cause notice of the pendency of said cause to be published for three weeks in some public newspaper, the first of which shall be at least three months before the sitting of the next term of the court in which the case is pending, within this state; on proof of which publication, the court shall proceed to hear and determine said cause, in the same manner as if process had been actually served upon the said defendant." Hutchison's Dig., p. 931. That regulation, by a subsequent act passed on the 2d day of March, 1833, is made applicable to the high court of errors and appeals, and it was conceded at the argument that the publication was made under that provision. On the filing of the affidavit, showing that the defendants in that suit were non-residents of the state, it was ordered by the court that unless they appeared on the third Monday of October, 1853, "the court will proceed to hear and determine the cause in the same manner as if process had been actually served; and it was further ordered that a copy of the order be published in a certain public newspaper published at the capital of the state, once a week for three weeks." Publication was accordingly made, as appears by the decree in the cause, and on the 23d day of January, 1854, the decree was entered reversing the decree of the subordinate court; and the question is, whether the notice was sufficient to give the appellate court jurisdiction of the case and the parties. That the subordinate court had full jurisdiction is admitted. Both of the respondents appeared in that suit, and litigated the merits for the period of three years. From the evidence in the case, it appears that they got possession of the slaves in Tennessee, in violation of the rights of the first-named complainant, and removed them to the state of Mississippi. Suit was brought against them in a subordinate court of the latter state, and after three years' litigation, and when they had succeeded in dismissing the bill of complaint, they removed to Texas, carrying the slaves with them, although they knew the complainants intended to seek a revision of the decree in the appellate court. All of the equities of the case are therefore with the present defendants.

§ 1671. *A decree in equity is of equal dignity with a judgment at law, and in like case an action of debt will lie upon it.*

Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court. Whenever the parties to a suit, and the subject matter in controversy between them, are within the regular jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law. Accordingly, it was held by this court, in *Pennington v. Gibson*, 16 How., 65, that in all cases where an action of debt can be maintained upon a judgment at law to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount, and that the records of the two courts are of equal dignity and binding obligation. Had the decree, therefore, been rendered in the subordinate court before the appeal, the right of the plaintiffs below to recover in this suit would have been beyond question, unless there is some other error in the record. Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers. *Gregnon's Lessee v. Astor*, 2 Howard, 319; *Voorhees v. The Bank of U. S.*, 10 Pet., 449. Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts; and it was held by this court, in *Webster v. Reid*, 11 How., 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entertained. Numerous cases, also, are cited by the counsel of the present plaintiffs, applicable to the judgment or decrees of a court exercising original jurisdiction, which assert the general rule that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And some of them go much further, and lay down the rule as applicable to the inception of the suit, that notice by publication is insufficient to support the judgment in any jurisdiction, except in the courts of the state where it was rendered. *Boswell's Lessee v. Otis et al.*, 9 How., 350; *Oakley v. Aspinwall*, 4 Comst., 513. None of these cases, however, precisely touch the question under consideration. Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy.

§ 1672. *A writ of error is a continuation of the original suit. It is not an original writ in the sense of beginning a new action.*

Contrary to the views of the counsel for the present plaintiffs, we think there is some distinction between the notice required to be given to an appellee or defendant in error and the service of process in the original suit. A writ of error is said to be an original writ, because, at common law, it was issued out of the court of chancery; but its operation is rather upon the record than the person. Under the judiciary act, says Marshall, C. J., the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record, by removing the record into the supervising tribunal. Suits cannot, under the judiciary act, be commenced against the United States; and yet writs of error, accompanied by citations, have uniformly issued for the removal of judgments recovered in favor of the United States into this court for re-examination. Such cases are of daily occurrence, and the judgments are here reversed or affirmed, as they are with or without error; and it has never been supposed that the writ of error in such cases, though sometimes involving large amounts, was a suit against the United States. Plainly, therefore, there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action; and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens v. Virginia*, 6 Pet., 410; *Clark v. Matthewson*, 12 Pet., 170. No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the appellate court; and where, as in this case, personal service was impossible in the appellate court, through the act of the defendant in error, it must be held that publication, according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. Constructive notice, says Mr. Justice Baldwin, in *Hollingsworth v. Barbour et al.*, 4 Pet., 475, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders for publication, and providing that the publication, when made, shall authorize the courts to decree. *Regina v. Lightfoot*, 26 Eng. L. and Eq., 177. As stated by this court in *Harris v. Hardeman et al.*, 14 How., 339, a judgment upon a proceeding *in personam* can have no force as to one on whom there has been no service of process, actual or constructive, and who has had no day in court or notice of any proceeding against him; judgment in that case had been rendered without any sufficient notice, either actual or constructive, and of course it was held to be irregular; but the opinion of the court clearly recognizes the principle that constructive notice in certain cases may be sufficient to bind the party. Every person, as this court said in the case of *The Mary*, 9 Cran., 444, may make himself a party to an admiralty proceeding, and appeal from the sentence; but notice of the controversy is necessary, in order to enable him to become a party. When the proceedings are against the person, notice is served personally, or by publication; but where they are *in rem*, notice is served upon the thing itself. Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, it cannot be admitted that he can defeat an appeal by removing from the juris

diction, so as to render a personal service of the citation impossible. On that state of facts, service by publication according to the law of the jurisdiction and the practice of the court, we think, is free from objection, and is simply sufficient to support the judgment of the appellate court. *Mandeville et al. v. Riggs*, 2 Pet., 489; *Hunt et al. v. Wickliff*, 2 Pet., 214.

§ 1673. *A decree fixing a valuation, and founded upon parol proof, is evidence in subsequent litigation between the same parties.*

2. It is insisted, in the second place, by the counsel of the plaintiffs, that the court erred in allowing the decree to go to the jury as evidence of the value of the hire of the slaves subsequently to the 4th day of February, 1854. That theory overlooks the fact that testimony had been introduced by the present defendants showing the value of the slaves at the time of the trial, and that the decree was to be taken in connection with the parol testimony, showing that the slaves were still living and in the possession of the parties originally charged with their abduction. No evidence had been offered by the defendants, and, in view of the circumstances, we think the charge was correct and that the prayer for instruction was properly refused.

§ 1674. *Upon the transfer of a case from the equity to the law docket a bill of exceptions will not bring up prior proceedings.*

3. While the cause was pending on the chancery side of the court, on motion of the plaintiffs, the court struck out the answer of the defendants, and it is now insisted that the action of the court in that behalf was erroneous. All we think it necessary to say in reply to this objection is to remark that the cause was subsequently transferred to the law docket without objection, and that a bill of exceptions does not bring into this court any of the prior proceedings for revision. Whatever may be the practice in the state courts, counsel must bear in mind that there is a broad distinction between a suit at law and a suit in equity, and must understand that this court cannot and will not overlook that distinction. The judgment of the district court is affirmed, with costs.

UNITED STATES *v.* HODGE.

(3 Howard, 534. 1844.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case is brought here by a writ of error to the circuit court for the eastern district of Louisiana, and a motion has been made to dismiss it because the citation was signed by the clerk and not by a judge of the circuit court, or a justice of the supreme court, as directed by the act of congress of 1789, c. 20, § 22.

§ 1675. *The citation must be signed by the judge. (a)*

The defendant is not bound to appear here unless the citation is signed in the manner prescribed by law; and, as that has not been done in this case, the writ must be dismissed.

BACON *v.* HART.

(1 Black, 38, 39. 1861.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—We have looked into this record, and find that the writ of error must be dismissed. The action was in the nature of an ejectment, and brought to recover possession of land. The plaintiff below was William Hart, *junior*, a citizen of New York, residing at Manilla. His coun-

(a) Under the acts of 1789 and 1803, whenever a citation is necessary it must be signed by the judge. *Villalobos v. United States*, 6 How., 81.

sel in the cause was William Hart, *senior*. In March, 1858, judgment was rendered by the court for the plaintiff. In October of the same year a writ of error was sued out, returnable on the first Monday in December next thereafter, and service of the citation was on the 9th of October admitted by William Hart, *senior*. But this writ of error was not returned during the term to which it was made returnable, and failed, therefore, to bring up the case. A second writ of error was taken by the defendant below in August, 1859, returnable to the ensuing December term of this court. The citation under this latter writ was directed to William Hart, *junior*, and served according to the marshal's certificate, on Mary Hart, widow and executrix of William Hart, *senior*, who died after the judgment, and on J. D. Stevenson, his former law partner.

§ 1676. *Service of citation on the executrix or the law partner of counsel of record is not sufficient.*

A service of the citation on the attorney or counsel of the proper party is sufficient; but the executrix of the counsel on record was not the counsel of her testator's client. His character and duties as counsel did not devolve on his own personal representative after his death. Nor is Mr. Stevenson to be regarded as the counsel of William Hart, *junior*, merely because he had been the partner of William Hart, *senior*. We cannot notice law partnerships or other private relations between members of the bar. This may have been a partnership solely because it provided for a division of profits, without putting either partner under any responsibility for the suits conducted by the other. The courts can know no counsel in a cause except those who regularly appear as such on the record. The citation not being served on the party as his counsel, the cause is not brought into this court, agreeably to the act of 1789; and the writ must, therefore, be dismissed for want of jurisdiction.

Writ of error dismissed.

POYDRAS DE LA LANDE v. TREASURER OF LOUISIANA.

(17 Howard, 1-3. 1854.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case is brought here by writ of error directed to the supreme court of the state of Louisiana, under the twenty-fifth section of the act of 1789.

It appears that a proceeding was instituted in the state court by the treasurer of the state to recover certain taxes alleged to be due from the plaintiffs in error, under a law of Louisiana which imposes a tax of ten per cent. upon the amount of property inherited by aliens in that state. The payment of the tax was resisted by the plaintiffs in error, but the case was finally decided against them in the supreme court of Louisiana, and they thereupon brought this writ of error, upon the ground that the authority exercised under the state law was contrary to the constitution and treaties of the United States. The citation required by the act of 1789 was served on the treasurer, by whom and in whose name, as treasurer, the proceedings had been instituted and conducted, and in whose favor the judgment was entered.

§ 1677. *Where an officer of a state prosecutes for the state, the citation must be served on him.*

A motion is now made to dismiss this writ of error, upon the ground that the state is the real party to the suit, in the name of the treasurer, and that the citation ought, therefore, to have been served on the chief executive magistrate

and attorney-general of the state, according to the provisions of the tenth rule of this court. But that rule applies to those cases only in which the state is a party on the record. It is intended to point out the officers who shall be held to represent the state when process is issued against it, so far as the service of the process is concerned. The only mode in which a state can be cited to appear is by serving the process on some one or more of its officers; and those above named in the rule were considered by the court to be its appropriate representatives in a summons or citation to appear in this court. But the citation must be directed to the party on the record, and served on him. And when an officer of the state is the party prosecuting the suit for the state, the citation must be served on him. In this case a notice or citation on the chief executive officer or attorney-general would not be sufficient; for the treasurer is the person who has obtained the judgment, and has the right to receive the money. He is the actor—the plaintiff in the suit. And the chief executive officer and attorney-general do not represent him, and may or may not support his proceedings.

This rule of practice has been uniformly followed in this court. There have been many cases in which an officer of the state, acting in behalf of the state, has been one of the parties. And the tenth rule has never been applied to a case of that kind; and the citation has always been served on the officer, whether conducting the proceedings in his own name or that of his office. The practice is founded upon the language of the act of 1789, c. 20, which directs the “adverse party” to be cited on a writ of error or appeal. The “adverse party” is the one which appeared in the suit, and who prosecuted or defended it, and in whose favor the judgment was rendered, which the plaintiff, in the writ of error, seeks to reverse. The motion to dismiss this writ of error must, therefore, be overruled.

§ 1678. **In general.**—Where it appears on writ of error to the circuit court from the supreme court that no citation has been issued to the defendant, the writ must be dismissed. *Hogan v. Ross*, 11 How., 295. See § 1657.

§ 1679. No writ of error lies from the circuit to the district court unless the plaintiff in error shall have given the notice required by, and has otherwise conformed to, the provisions of § 4981 of the Revised Statutes. *Wear v. Mayer*, 6 Fed. R., 659.

§ 1680. In case a state supreme court consists of a chief justice and one or more associate justices, if the citation on a writ of error to review its decision under the twenty-fifth section of the judiciary act is signed by one of the associate justices instead of by the chief justice, the writ must be dismissed for want of jurisdiction. *Bartemeyer v. Iowa*, 14 Wall., 27. See § 1699.

§ 1681. **Waiver.**—Where a party appears and makes no objection, he is held to have waived want of notice, or any defect in the citation. *Carroll v. Dorsey*, 20 How., 204. See the case, §§ 1365-66. See § 1657.

§ 1682. An appearance by the defendant waives an irregularity in the citation. *Aldrich v. Aetna Company*, 8 Wall., 491. See the case, §§ 798-802. An objection for want of notice comes too late after a general appearance. *Smith v. Mason*, 14 Wall., 433.

§ 1683. If no citation has been served on the appellee, and he enters a general appearance and makes no motion to dismiss the appeal, he must be deemed to have waived the defect, and cannot, at a subsequent term, move to dismiss on that ground. *Buckingham v. McLean*, 13 How., 150.

§ 1684. **When necessary.**—The object of a citation is notice; and where the appeal is taken in open court, and at the same term at which the decree was rendered, or the record shows notice in fact, no citation is necessary. *United States v. Gomez*,* 1 Wall., 690; *United States v. Vigil*, 10 Wall., 423 (§§ 1314-17); *Reiley v. Lamar*, 2 Cr., 344; *Brockett v. Brockett*, 2 How., 238 (§§ 1513-16); *Smith v. Mason*, 14 Wall., 433.

§ 1685. And the fact that the citation is signed by the clerk is not important. *Villabolas v. United States*,* 6 How., 81. See § 1662.

§ 1686. Where security is taken out of court, and after the term, a citation is necessary. *Sage v. Railroad Co.*, 6 Otto, 715. See the case, §§ 1531-32.

§ 1687. In case of an appeal from the circuit to the supreme court from a final decree in equity, a citation is not necessary if an appeal be taken at the same term at which the final decree is made. *Reiley v. Lamar*, 2 Cr., 344.

§ 1688. Under the acts of 1789 and 1803, when the appeal is not prayed in open court, and at the term at which the final decree is passed, a citation is necessary; and where necessary, the law requires it to be signed by the judge. (*United States v. Hodge*, 3 How., 534, and *The San Pedro*, 2 Wheat., 142, cited.) It must also be served and returned at the term to which the appeal is returnable. *Villabolas v. United States*,* 6 How., 81.

§ 1689. The mere presence of counsel in court at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, will not dispense with the necessity for a citation; and where the appeal is not returned to the next term of the court, it becomes void, and a citation subsequently issued is of no avail. *Castro v. United States*, 3 Wall., 46. See the case, §§ 1298-1301. See §§ 1658, 1660.

§ 1690. Where a statute requires notice to the appellee when the appeal is not taken on the day of trial, a default taken against an appellee who has not been notified is error. *Sinclair v. McElmurry*,* Hemp., 28.

§ 1691. Under the act of 1828, regulating appeals from the courts of Florida in proceedings for the confirmation of land claims, an appeal taken in the office of the clerk, without a citation signed by the judge and returnable to the next term of the supreme court, was void. *Villabolas v. United States*,* 6 How., 81.

§ 1692. On appeal from the consular court of Canton to the circuit court for the district of California, the record must show the allowance of an appeal, and, unless the appeal is taken in open court, it seems that a citation is also necessary. Whether a citation is not always necessary when the appeal is taken after the time of the rendition of the decree, there being no terms of such court, *quære*. *Steamer Spark v. Lee Choi Chum*, 1 Saw., 714; *Tazaymon v. Twombly*, 5 Saw., 81.

§ 1693. On an appeal in admiralty to the circuit court, no citation is necessary; a written notice by the proctor to the proctor of the adverse party is sufficient. *The Ellen*,* 4 Blatch., 108.

§ 1694. **Miscellaneous.**—A writ of error will not be dismissed on account of an obvious clerical mistake in the date of the citation. *Davidson v. Lanier*, 4 Wall., 453.

§ 1695. The original citation, subscribed by the judge, must be returned with the writ of error. *Wilson v. Daniel*,* 3 Dal., 401.

§ 1696. A citation issued on the 27th of August, 1847, did not bring up an appeal returnable to December term, 1846. *United States v. Curry*,* 6 How., 106.

§ 1697. The citation on a writ of error should be signed by a judge, and not by a clerk; and it seems that, if the citation is signed by the clerk, the writ must be dismissed on a motion made within the proper time. But the appearance of a party in the supreme court, without making a motion to dismiss during the first term, is a waiver of any defect in the citation, and is an admission that he has received notice to appear to the writ of error. *Chaffee v. Hayward*, 20 How., 209. See § 1662.

§ 1698. Where a case was argued and determined in the supreme court without an appearance on the part of the appellee, and at the next term it was made to appear on motion that the citation was never served, the court declared its decree of the preceding term to be null and void, and revoked the mandate to the lower court. *Ex parte Crenshaw*,* 15 Pet., 119.

§ 1699. A writ of error to a state court dismissed because the citation was signed by a district judge, instead of by the chief justice, or judge, or chancellor of the court rendering or possessing the judgment or decree, or by a justice of the supreme court of the United States. *Palmer v. Donner*,* 7 Wall., 551. See § 1680.

§ 1700. The statute requires a citation to be issued by the judge who allows the writ of error, and it cannot be legally issued by any other judge or court. *Insurance Co. v. Mordecai*, 21 How., 195. See the case, §§ 1367-68.

§ 1701. Under the practice in Louisiana, where the wife sues and the husband is formally joined, a misnomer of the husband in the citation is not material error; nor is the omission to describe the opposite party in his capacity as trustee a material error. *Peale v. Phipps*,* 8 How., 256.

§ 1702. Cause dismissed because the citation issued to a person who is not a party. *Davenport v. Fletcher*, 16 How., 142.

§ 1703. A citation addressed to the original parties, one or both of whom died before the original decree, is irregular; but the irregularity may be waived by an acknowledgment of

service by the attorney with full knowledge of the facts. *Bigler v. Waller*, 12 Wall., 142. See the case, §§ 1377-99.

§ 1704. Counsel for appellees moved to withdraw his appearance, on the ground that he had been obliged to direct his appearance to be entered while absent from the county, and without opportunity to examine the proceedings. The court, on granting the motion, said, "this leave will not authorize a motion to dismiss for want of a citation, nor for mere irregularity in its service, provided the appeal is in other respects regularly brought up and authorized by law. The citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and he cannot afterwards withdraw it. But the appearance does not preclude the party from moving to dismiss for the want of jurisdiction, or any other sufficient ground, except for the one above mentioned." *United States v. Yates*,* 6 How., 605.

XIV. THE RECORD.

SUMMARY — *Absence of oral evidence in chancery*, § 1705. — *Authentication*, § 1706.

§ 1705. Where the oral evidence in a chancery case is not found in the record, the decree will be reversed and the cause remanded. *Conn v. Penn*, §§ 1707, 1708.

§ 1706. A transcript of the record is sufficiently authenticated for the purposes of an appeal or a writ of error, if it is signed by the deputy in the name of and for the clerk of the court from which the appeal comes, or to which the writ of error is directed, and sealed with the seal of that court. *Garneau v. Dozier*, § 1709. See § 1718.

[NOTES.—See §§ 1710-1747.]

CONN v. PENN.

(5 Wheaton, 424-428. 1820.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court for the district of Pennsylvania, dismissing the bill of the plaintiffs. Without going into the merits of the case, the counsel for the plaintiffs contend that the decree ought to be reversed, because it appears to have been pronounced in part on parol testimony which has not been introduced into the record, and because the decree was made when the parties interested were not all before the court.

§ 1707. *All testimony which was before the circuit court ought to appear in the record of chancery cases appealed to the supreme court. (a)*

The laws of the United States have always proceeded on the supposition that, in revising decrees in chancery, the facts as well as the law should be laid before this court. The judiciary act (1 Stats. at Large, 73), which directs that the mode of proof shall be by oral testimony, and that witnesses shall be examined in open court, also directs that a statement of facts shall be placed on the record. The act of April 29, 1802, s. 25 (2 Stats. at Large, 166), leaves it to the discretion of the courts in those states where testimony in chancery is taken by depositions, to order, on the request of either party, the testimony of the witnesses to be taken by depositions. The act of March 3, 1803 (2 Stats. at Large, 244), repeals those parts of the judiciary act which authorize a writ of error, and a statement of facts in chancery cases; allows an appeal from the decrees of a circuit court sitting in chancery; and directs that a copy of the bill, answer, depositions and all other proceedings, of what kind soever, in the cause, shall be transmitted to this court, and that no new evidence shall be heard. Previous to this act, the facts were brought before this court by the statement of the judge. The depositions are substituted for that statement; and it would seem since this court must judge of the fact as well as the law,

(a) In *New Orleans v. United States*,* 5 Pet., 449, the evidence not appearing in the record the decree was reversed.

that all the testimony which was before the circuit court ought to be laid before this court. Yet the section which directs that witnesses shall be examined in open court is not in terms repealed. The court has felt considerable doubts on this subject, but thinks it the safe course to require that all the testimony on which the judge founds his opinion should, in cases within the jurisdiction of this court, appear in the record. The parties may certainly waive testimony by consent, but if this consent does not appear, it cannot be presumed; and where it is shown on the record that witnesses were examined in open court, this court cannot say how much the opinion of the circuit court was influenced, and ought to have been influenced, by their testimony.

§ 1708. *An interlocutory decree, disposing to a great extent of the merits of the case, should not be rendered till all necessary parties are before the court.*

In this case an interlocutory decree was rendered, which decided, to a great extent, the merits of the cause, at a time when one of the defendants named in the bill was not before the court, and when it appeared that a person not made a defendant was deeply concerned in interest. This decree granted relief on certain conditions to certain classes of the plaintiffs, and directed them to appear before commissioners, and to exhibit their proof that they came within the descriptions of persons who were entitled to relief. They refused to appear before these commissioners; and upon the coming in of the report stating this fact, their bill was dismissed with costs. The object of this bill was to obtain conveyances from John and William Penn, of certain lands which they were supposed to hold as tenants in common, and to which the plaintiffs asserted an equitable title. It was irregular to make the decree which was made respecting the title until both the defendants were before the court. But it is the fault of the plaintiffs that they were not. The bill prays conveyances of the legal title on the payment of so much money as was still due on certain principles on which they allege their equitable title to have been acquired. It was referred to commissioners to ascertain the amount of these sums, as well as to class the respective claimants according to the interlocutory decree. They refuse to appear before the commissioners and to exhibit either their equitable titles or to show the payments they have made. On what pretense can such plaintiffs claim the aid of a court of equity? What is a court to do in such a state of things? Where a party asking its aid refuses to comply with the conditions on which that aid must depend, a court is certainly correct in refusing its aid, and may dismiss the bill. But in such a case, we think it would be harsh to make the decree of dismissal a bar to a future action. It is not certain that this decree is on such a hearing as to be a bar to a future action; and this point is not positively decided. It is unnecessary to decide it, because we think the interlocutory decree was irregular, and ought not to have been made until William Penn, a tenant in common with John Penn, was before the court. The defendants are left at liberty to proceed with their legal title, and this must be sufficient to prevent the plaintiffs from practicing unnecessary delays.

For the irregularities which have been stated, we think the decree ought to be reversed and the cause remanded, that the proper proceedings may be had therein.

GARNEAU *v.* DOZIER.

(10 Otto, 7, 8. 1879.)

Appeal from U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Motion to dismiss. The authentication of the transcript of the record was sealed with the seal of the court, and signed “M. M. Price, clerk of said court, by T. L. Crawford, deputy.”

§ 1709. *Authentication of transcript of record.*

Opinion by WAITE, C. J.

Since the act of June 8, 1872 (17 Stat., 330; Rev. Stat., 558, 624, 678), authorizing the appointment of deputies of the clerks of the courts of the United States, a transcript of the record is sufficiently authenticated for the purposes of an appeal or a writ of error to this court, if it is signed by the deputy in the name of and for the clerk of the court from which the appeal comes, or to which the writ of error is directed, and sealed with the seal of that court. The transcript sent up in this case comes within this rule.

Motion denied.

§ 1710. *Requisites.*—Where necessary papers are omitted from the record the appeal will be dismissed, unless the papers are supplied within the time fixed by the court. *Railroad Co. v. Schutte*, 10 Otto, 647. See the case, §§ 1528-30.

§ 1711. An agreed statement of facts, and the judgment of the court below, but nothing further, is not a sufficient record. *Curtis v. Petitpain*,* 18 How., 109.

§ 1712. Where appeals were taken in open court, which required no citation, the objection that the docket and transcript do not contain the names of the appellants and appellees is untenable, where it appears satisfactorily from the order and decree appealed from who are the appellants and who the appellees. *Miltenberger v. Logansport Railway Co.*, 16 Otto, 305. See § 1597.

§ 1713. Where, on appeal, the record contained great quantities of repetitions and useless and irrelevant matter, and was but poorly arranged and indexed, each party was required to pay his own costs, though the judgment was reversed. Though it did not appear whose the fault was, yet it was held to be the duty of the appellant to see to it that there is a proper record. *Railway Company v. Stewart*, 5 Otto, 284.

§ 1714. The record on writ of error in an equity suit from the supreme to the circuit court must contain a statement of facts, or the writ will be dismissed. *United States v. Hooe*, 1 Cr., 318.

§ 1715. In case of an appeal from a consular court of Japan to the circuit court of California, the transcript should be a copy in chronological order of all the proceedings in the case, from the beginning to the end, as a single document, and this should be certified at the end to be a full, true and correct copy of the pleadings, depositions and all the proceedings in the case; and that the same constitute the transcript on appeal to the circuit court. It should be authenticated by the official signature and seal of the consul. The papers used in the court below should remain there as parts of the record of that court. The record should also show an allowance of the appeal; and where the appeal is not taken in open court, at the time of the rendition of the judgment or decree, and before the adjournment of the court, the record should show a citation to the appellee, and due service thereof to appear in this court. If not conforming to these requirements, the appeal must be dismissed. *Tazaymon v. Twombly*, 5 Saw., 81.

§ 1716. *Wanting.*—No judgment of affirmance or reversal will be rendered in any case upon a writ of error unless a transcript has been filed, for otherwise there is no case for the consideration of the court. *Roberts v. Tucker*,* 1 Wash. Ty., 207.

§ 1717. If the plaintiff in error fails to file a transcript of the record, the defendant may either move to dismiss for that reason, or he may have the transcript sent up, and have the matter considered. *Ibid.*

§ 1718. *Certificate.*—On an appeal to the supreme court from the decree of the circuit court of the District of Columbia, in a case in which the matter in dispute was less than \$1,000, but in which an appeal had been allowed by one of the justices of the supreme court, as was proper in certain cases, the lack of a certificate that the printed copy of the record was a transcript of the record was held to be a sufficient ground for the dismissal of the appeal. *Campbell v. Read*, 2 Wall., 199. See § 1706.

§ 1719. Part of the record.—The supreme court in a case brought before it upon a writ of error will not consider any paper a part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. The appellate court cannot know what evidence was given to the jury unless it is spread upon the record in the proper and legal manner. So the unauthorized certificate of the clerk that certain documents were read cannot make such documents a part of the record so that they will be considered on a writ of error. *Fisher v. Cockerell*, 5 Pet., 253.

§ 1720. An affidavit for a continuance is no part of the record of a case unless introduced by one of the parties for a legitimate purpose. *Campbell v. Rankin*, 9 Otto, 264.

§ 1721. Consent of parties that judgment may be rendered for the plaintiff, varying in amount according to certain contingencies, which appears on the minutes, forms no part of the record brought to the supreme court on error. The supreme court will take no notice of it, and will simply order a *venire de novo*, instead of sending its mandate requiring judgment to be entered in a certain manner. *Lanusse v. Barker*, 3 Wheat., 147.

§ 1722. The petition of one party for a writ of error, and stating the evidence as he understood it, which is not made a part of the bill of exceptions, nor verified by the signature of the judge, is no part of the record, and the appellate court is not bound to take notice of it, even if formally certified by the clerk and returned as a part of the record. *Strain v. Gourdin*, 2 Woods, 382.

§ 1723. The production of a note sued on in the court below does not make it a part of the record so that it can be compared by the appellate court with the instrument mentioned in the declaration, unless it is produced on oyer. *Cook v. Gray*, Hemp., 84.

§ 1724. An admission of record in a suit in equity, not signed by either party, which is sent to the supreme court on appeal from the decree of the circuit court, and is certified by the clerk to be an admission made by the complainants on the trial of the suit, will be considered by the supreme court though not a part of the record. *Burke v. Smith*, 16 Wall., 398.

§ 1725. In an admiralty case, where a certificate of the clerk of the lower court was attached to a deposition in the record, showing that it was not used on the trial of the case in the court below, the supreme court held that, although forming a part of the record, the clerk's certificate should be considered and given controlling weight, and that the deposition must be considered open to all objection which could be urged against it if offered for the first time in the circuit court. *The Samuel*, 1 Wheat., 15.

§ 1726. The territorial supreme court, upon a writ of error, will not consider any paper a part of the record which is not made so by the pleadings or by some opinion of the court referring to it. So a motion to be allowed to file a set-off on appeal from the judgment of a justice of the peace which is not included in a bill of exception, but is brought up on the certified transcript of the records of the district court, will not be considered by the territorial supreme court. *Haney v. Clark*,* 1 Pin. (Wis.), 301.

§ 1727. A paper found amongst the files of a cause, which purports to show how a certain notice was given, and which contradicts the record, the latter showing that due notice was given, is no part of the record, and is of no effect. In order to render it a part of the record it should form some part of the pleadings in the cause, or be brought under and ingrafted upon the action of the court by some motion from the parties. Without this, such paper can no more be a portion of the record than would the knowledge of facts on the part of a witness who had been summoned and not examined or the oral testimony given to a jury and noted by exception or otherwise. *Sargeant v. State Bank of Indiana*, 12 How., 384.

§ 1728. Review by appellate court.—The supreme court upon a writ of error will not pass upon a question not presented by the record. *The City v. Babcock*, 3 Wall., 244.

§ 1729. Nothing can be assigned for error in an appellate court which does not appear upon the face of the record. If error is assigned according to the local practice, the question to be considered is not whether the objection is valid, but whether it is raised by the record. *Fisher v. Cockerell*, 5 Pet., 253.

§ 1730. Errors apparent in other parts of the record may be re-examined by the supreme court as well as those which are shown in the bill or bills of exception. The verdict and judgment are a part of the record. Whenever error is apparent in the record, the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and a writ of error will lie when a party is aggrieved by an error in the foundation, proceedings, judgment or execution of a suit in a court of record. *Insurance Company v. Piaggio*, 16 Wall., 386.

§ 1731. Where, in an equity case, the record shows that a demurrer was filed, and, without stating what disposition was made of it, the record shows that an answer was subsequently filed, the supreme court on appeal will presume that the demurrer was abandoned. *Basey v. Gallagher*, 20 Wall., 679.

§ 1732. The supreme court, in cases at law, can only review the errors of the court below in matters of law appearing from the record. If the facts upon which the lower court pronounced its judgment do not appear from the record, it is impossible for the supreme court to say that the judgment is erroneous. So where, after a special verdict in the circuit court, which was acknowledged to be defective, the parties agreed that the court might draw inferences of fact not found by the jury, and the findings of the court do not appear from the record, but the judgment can be supported by a reasonable presumption that the court found certain facts, the judgment of the circuit court will be affirmed. *Prentice v. Zane*, 8 How., 485.

§ 1733. What the record should contain.—The charge of the court to the jury should not be spread at large upon the record, and where this is done the only matter which will be considered by the supreme court upon writ of error is whether the charge contains any misstatements of the law. *Magniac v. Thompson*, 7 Pet., 390; *Gregg v. Sayre*, 8 Pet., 251; *Conrad v. Pacific Ins. Co.*, 6 Pet., 280. Only the substance of the charge should appear. *Evans v. Eaton*, 7 Wheat., 426.

§ 1734. In case of a writ of error from the territorial supreme court to the territorial district court, the record must show a motion for a new trial made and overruled, and must contain all the evidence bearing on the exceptions taken and relied on, and the instructions given, if error is claimed therein; and an amended transcript cannot be filed without permission. *Iverson v. Alsop*,* 1 Wyom. Ty., 254.

§ 1735. Where the evidence in the court below does not appear from the record, the instructions of the court will be presumed to be correct. *Blakely v. Ruddell*, Hemp., 19.

§ 1736. No evidence can be considered by the supreme court on appeal that was not before the circuit court; and evidence certified with the record must be considered on appeal as the only evidence before the court below. If in certifying the record a part of the evidence in the case has been omitted, it seems that it might be certified in obedience to a *certiorari*, but in such case it must appear from the record that the evidence was used, or offered to the circuit court. *Holmes v. Trout*, 7 Pet., 210.

§ 1737. Except by consent of parties the supreme court on an appeal from a circuit court in a suit in equity cannot consider a deed not referred to in the pleadings or made an exhibit in a cause, even though it was erroneously used on the hearing in the court below. *Boone v. Chiles*, 10 Pet., 208.

§ 1738. The verdict of a jury upon a feigned issue must be presumed by the supreme court to be correct, when it has not the evidence before it. *Mays v. Fritton*, 20 Wall., 420.

§ 1739. Where the record in the court below does not exhibit the evidence, the territorial supreme court will presume that the witnesses offered were competent, and that the evidence was sufficient to warrant the verdict and judgment. *Nisqually Mill Co. v. Taylor*,* 1 Wash. Ty., 4.

§ 1740. Where exceptions are taken to the report of a master in chancery, only that part of the testimony need be reported which is relied on to support, explain, or oppose a particular exception. *Harding v. Handy*, 11 Wheat., 126.

§ 1741. Exceptions to testimony taken in the court below will not be considered by the supreme court of the territory on a writ of error, unless the evidence is incorporated in the record. *Doty v. Strong*,* 1 Pin. (Wis.), 325.

§ 1742. It is probable that in equity cases the circuit courts may permit the examination of witnesses orally in open court, and if that practice is adopted in any case the testimony taken in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded by the supreme court on appeal. So, too, if testimony is objected to and ruled out, it must still be sent up with the record, subject to the objection, or it will not be considered. A case will not be sent back to have the rejected testimony taken, even though the appellate court might, on examination, be of the opinion that it ought not to have been sustained. Ample provision has been made by the rules for taking the testimony and saving the exceptions, and parties who prefer some other mode of presenting their case must be careful to see that it conforms in other respects to the established practice of the court. *Blease v. Garlington*, 2 Otto, 7.

§ 1743. An omission of the names of the jurors from the transcript is not material. *Owens v. Hanney*,* 9 Cr., 180.

§ 1744. A case dismissed because it was brought up on an agreed statement of facts, without any of the proceedings in the court below appearing in the record. *Keen v. Whitaker*,* 13 Pet., 459.

§ 1745. An objection to the allowance of clerk and counsel fees cannot be entertained where the record contains nothing from which the court can determine what services were rendered, or whether the charges were in excess of what is authorized by law. *Flanders v. Tweed*,* 15 Wall., 450; *Jennings v. The Perseverance*, 3 Dall., 337.

§ 1746. Jurisdictional facts must appear in the record on a writ of error to the circuit court, or the judgment will be reversed. *Capron v. Van Noorden*, 2 Cr., 126; *Montalet v. Murray*, 4 Cr., 47.

§ 1747. Private laws and special proceedings in a state legislature relative to the administration and sale of the estates of deceased persons are facts to be proved in the ordinary manner, and their existence will not be inquired into by the supreme court upon a writ of error if they are not found upon the record. *Leland v. Wilkinson*, 6 Pet., 322.

XV. EXCEPTIONS AND BILLS OF EXCEPTIONS.

1. *Exceptions.*

SUMMARY — *Exceptions taken on an issue before a jury*, § 1748.— *Must be taken below*, §§ 1749-1752.— *A mere objection to evidence is not sufficient*, § 1753.— *To instructions*, §§ 1754-1756.

§ 1748. Where exceptions are taken on the trial of an issue before a jury, but are not acted upon on the chancery side of the court, they will not be considered on appeal; and it is not material that the same judges sat in both courts. *Brockett v. Brockett*, §§ 1757, 1758. See § 1806.

§ 1749. Exceptions to a master's report cannot be taken for the first time in the supreme court. *Ibid.* See § 1770.

§ 1750. Exceptions to the reports of a master and a receiver cannot be made for the first time in the supreme court. *Terry v. Commercial Bank of Alabama*, §§ 1759, 1760.

§ 1751. A defect in the form of the pleadings, which could be reached by special demurrer, is cured by the verdict, and an objection cannot be made for the first time in the supreme court. *Laber v. Cooper*, §§ 1761-1765.

§ 1752. So, also, as to a defect in a verdict. A verdict, unless it is a special one, is always amendable by the notes of the judge. *Ibid.*

§ 1753. It is not sufficient merely to object to the admission of evidence; an exception must be taken and placed on the record. *Ibid.* See § 1858.

§ 1754. Error in the charge is not subject to review, unless an exception is taken before the case is submitted to the jury; it is not sufficient to raise the objection on a motion for a new trial. *Railway Co. v. Heck*, §§ 1766, 1767. See § 1852.

§ 1755. Exceptions to instructions, to be entitled to consideration, must be specific, and must point out the error complained of. *Railroad Co. v. Varnell*, § 1768.

§ 1756. Where the charge of the judge is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court; but in every such case the part of the charge to which exception is addressed ought to be distinctly pointed out. *Ibid.*

[NOTES.— See §§ 1769-1879.]

BROCKETT v. BROCKETT.

(3 Howard, 691, 692. 1844.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a bill in chancery, brought here by an appeal from the circuit court of the District of Columbia.

The complainants filed their bill, alleging themselves to be the legitimate heirs of Robert Brockett, deceased, and claiming as such one-half of the real and personal property of which he died seized and possessed. The defendants filed their answers, denying the allegations of the bill. An issue at law was directed to try the legitimacy of the complainants, and, after hearing the evidence, the jury found a verdict in their favor. Several exceptions were taken to the rulings of the court, in the admission of evidence to the jury, and to the refusal of the court to admit evidence offered by the defendants, which appear in two bills of exceptions. And these decisions, in relation to the trial of the issue, constitute the principal ground of controversy in the case.

§ 1757. *Where exceptions are taken on the trial of an issue at law, but not acted upon in the chancery court, they will not be considered on appeal. (a)*

It does not appear that any questions were raised on the chancery side of the court, growing out of these exceptions. And this not having been done, it is proper to inquire whether the exceptions can be considered in this court. It is contended that as the same judges sat in the court of law as in the court of chancery, it could not be necessary to bring before them as chancellors what they had decided in a court of law. Had the court of law been held by different persons from those who sat as chancellors, it is admitted that it would have been necessary to bring before the latter the points ruled in the trial of the issue. But is not the principle the same in both cases? The capacities in which the same tribunal acts on such occasions are as distinct as if the same duties had been performed by different tribunals. The distinction is the same as where a judgment at law is entered by a court which also exercises chancery powers; and which powers are invoked against its own judgment. In such a case it might as well be said, as in the present one, why may not the same court, whether acting at law or in chancery, having possession of the cause, finally decide it? The bills of exceptions are copied into the record; but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court sitting in chancery. An issue in part is directed by a court of chancery to inform its conscience. To bring the fact or facts before the jury at law, a feigned issue is made by pleadings, as at law; and if the proceedings of the jury be unsatisfactory to the court of chancery, either on account of the admission of incompetent evidence, the exclusion of evidence which is competent, or by a mistake of the facts by the jury, the court of chancery will order another trial of the issue. By the consent of parties these issues are sometimes tried without the formality of pleading. But in all cases where objections exist to the verdict, they must be brought before the court of chancery which ordered the issue. And where this is not done in an inferior court, the objections cannot be taken in the appellate court of chancery. It is a general rule of practice, that no point arising on the pleadings or evidence in an appellate court shall be made which was not brought to the notice of the inferior court. And we think, in this case, that the exceptions taken on the trial of the issue at law, not having been acted on by the court of chancery below, cannot be insisted on in this court.

§ 1758. *Exceptions to a master's report must be taken in the lower court.*

Being satisfied of the legitimacy and consequent heirship of the complainants from the verdict of the jury, the court below referred to a master the rents received by the defendants, and other matters of account pertaining to the estate. And to some of the items allowed by the master objections are made before this court. But it does not appear that these objections were brought before the lower court by exceptions to the master's report. The

(a) A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to said court. 2 Dan. Ch. Pr. (3d Am. ed.), 1106; *Armstrong v. Armstrong*, 3 Myl. & K., 52; *Ex parte Story*, 12 Pet., 343; 3 *Graham & Waterman on New Trials*, 1553. The issue is directed to be tried for the purpose of informing the conscience of the chancellor, and aiding him to come to a proper conclusion. If he thinks the trial has not been a fair one, or for any other reason desires a new trial, it is in his discretion to order it. But he may proceed with the cause though dissatisfied with the verdict, and make a decree contrary thereto, if in his judgment the law and the evidence so requires. A decree in equity, therefore, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of a feigned issue in the cause; for the verdict may or may not have been the ground of the decree. It is the duty of the court of first instance to decide upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon the whole case, and cannot be made to turn on the correctness or incorrectness of the judge's rulings at the trial of the feigned issue. *Johnson v. Harmon*,* 4 Otto, 370.

seventy-third chancery rule is decisive on this subject. It provides that "the parties shall have one month from the time of filing the master's report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired." No exceptions having been filed in the circuit court to the report of the master, none can be heard in this court.

The verdict and the report of the master, which constituted the basis of the decree of the court below, not having been objected to in that court, cannot be objected to here, and consequently the decree of the circuit court is affirmed, with costs.

TERRY *v.* COMMERCIAL BANK OF ALABAMA.

(2 Otto, 454-456. 1875.)

APPEAL from U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The defendant, the Commercial Bank of Alabama, was a banking corporation organized under the laws of that state, and had become insolvent. The appellant, a citizen of the state of South Carolina, brought a suit in the district court for the middle district of Alabama, at that time exercising circuit court powers, to wind up the bank under the provisions of the twenty-first section of its charter. Plaintiff alleged and proved that he was the owner of about \$3,000 of the notes of the bank, on which he had demanded payment, and been refused. The bank admitted its insolvency; and a receiver was appointed by consent to wind up its affairs, and publication made for all creditors to come in and prove their claims. The receiver made his report, which was referred to a master, who also reported. These reports, and several supplemental reports, were all confirmed without exceptions, and a final order of distribution made among those who had proved their claims, allowing first the costs of the proceeding, including attorney's fees and other costs of suit. All of these were referred to a master, who reported, and to whose report no exceptions were taken. After all this was done, the appellant here and plaintiff below appeared in person, and filed numerous petitions and affidavits signed by himself, excepting to the decree, asking to set it aside, excepting to the reports, and suggesting many other matters and things in which he sought to modify or correct the decree. The foundation of all this seems to be the charge that his counsel deserted his interest, failed to except to the reports and consented to the decree because they received what he called an exorbitant allowance for their services out of the fund which should have gone to the creditors of the bank, thereby diminishing the amount of his dividend.

§ 1759. *Exceptions to the reports of a receiver and a master must be made below.*

As to all this, it is sufficient to say that these motions cannot be considered here. They are mainly addressed to the discretion of the court, coming as they do after a final decree on the merits. If appellant desired to place the case in a position where this court could review the action of the court on that class of questions, he should have filed his bill of review and made the proper issues and supported it by depositions. As it now stands, his motions are unsupported by anything but his own affidavit. So as to the errors alleged in the master's reports. There were no exceptions filed to these reports until after they were confirmed and a final order of distribution made. This court cannot review those reports on exceptions taken after that, and urged upon

us now on appeal. If, as appellant alleges, he has been defrauded by his counsel, he must sue *them* for what he has lost by the fraud. If he desire to set aside the decree because it was obtained by fraud, his remedy is by bill of review.

§ 1760. *A decree discharging stockholders in insolvent proceedings, without their being parties to the proceeding, is erroneous.*

But he complains of one error in the decree which is shown on the face of the proceedings, and as to which he is, we think, entitled to have it reversed. It appears that the creditors of the bank have not been paid the full amount of their claims, as allowed by the master and confirmed by the court. By the law of the charter, the stockholders are liable to be called on for contribution to make up this deficit. They have not been made parties to this proceeding. No rule or process has been served on them, nor any motion or petition or prayer filed to subject them to liability. The decree, however, orders "that the said Commercial Bank of Alabama, its officers and *stockholders*, be, and they are hereby, forever discharged from any and all liability for or on account of any debt or demand of whatsoever nature, now or hereafter, subsisting against the bank and officers or stockholders of the same." We see nothing in the proceedings to authorize the part of the decree which relates to the stockholders. Their liability has not been put in issue by any pleading, notice or paper in the cause; and while, under these circumstances, this part of the decree may be void for that reason, we still think appellant has the right to have it removed out of the way of his proceeding against these shareholders, if he should desire to do so.

The decree of the district court is affirmed as to all but this part of it, and the case is remanded to the circuit court for the southern district of Alabama, to which, by law, it has been transferred, with directions to modify the decree in that respect, as indicated in this opinion; and, when so modified, the decree is affirmed, appellant to recover costs of appeal.

LABER v. COOPER.

(7 Wallace, 565-571. 1868.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

§ 1761. *Unnecessary matter in bill of exceptions a violation of fourth rule.*

Opinion by MR. JUSTICE SWAYNE.

In this case the bill of exceptions furnishes the same ground of complaint which was remarked upon in *Lincoln v. Claffin*, 7 Wall., 132, heretofore decided at this term. In the case before us it fills an hundred and twenty-seven printed pages. The points arising for our consideration could have been better presented in a very small part of this space. Such a mass of unnecessary matter has a tendency to involve what is really important in obscurity and confusion. Its presence is a violation of the fourth rule of this court. Its examination consumes our time, increases our labor, and can subserve no useful purpose. The subject was so fully considered in the case referred to that we deem it unnecessary to pursue it further upon this occasion.

STATEMENT OF FACTS.—Winnowing away the chaff, we find the questions left for our examination neither numerous nor difficult of solution. The declaration contains two counts upon a promissory note, made by Laber to the Racine & Milwaukee Railroad Company, or order, for \$3,700, dated the

6th of May, 1856, payable five years from the 10th of May in that year, with interest at the rate of ten per cent. per annum, payable annually on the 10th of May; principal and interest payable at the office of the company, in the city of Racine, in the state of Wisconsin, and indorsed by the payee, by H. S. Durand, its president, to the plaintiff. The declaration contains also the common counts. The defendant pleaded the general issue and three special pleas. The first special plea avers that the note, and a mortgage securing its payment, were given to the railroad company for thirty-seven shares of its capital stock; that there was no consideration for the note; that it was obtained from the defendant by false and fraudulent representations; and that these facts were known to the plaintiff when the note came into his possession. The second special plea denies the indorsement of the note to the plaintiff, as averred in the first count. The third special plea is to the same effect as to the indorsement averred in the second count. All the special pleas conclude with a verification. To the first of the special pleas the plaintiff replied, denying knowledge of the alleged false and fraudulent representations, before and at the time of the indorsement and transfer of the note. To the second and third special pleas no replications were filed. The cause proceeded to trial. The record shows that a large mass of testimony was given by the defendant relating to both the defenses set up by the special pleas. A prayer for instructions was submitted by the defendant. The court refused to give them, but charged the jury fully upon the whole case. Both the subjects presented by the special pleas were fully discussed. Indeed they were the only grounds of the controversy between the parties. The case was tried in all respects as if the pleadings had been formal and perfect. The jury found for the plaintiff. The language of the verdict is: "We, the jury, find the *issue* for the plaintiff, and assess his damages," etc. The defendant moved for a new trial. The motion was overruled, and judgment entered upon the verdict. The defendant excepted to the refusal to charge as prayed, to twelve passages in the charge as given, and to the overruling of his motion for a new trial.

§ 1761a. *Objections for want of form in pleadings must be made in the court below.*

1. It is objected as an error that no replication was put in to the pleas denying the indorsement of the note. The plea of the general issue would have made it incumbent upon the plaintiff to prove the indorsement as averred in the declaration, but that the statute of Illinois adopted by the circuit court as a rule of practice dispenses with such proof, unless the fact is denied by the defendant under oath. The oath of the defendant was affixed to both the pleas raising the question. As they only denied what the plaintiff had alleged, contained no new matter and no special traverse, they should have concluded to the country, and not to the court. The defect was one of form, and could have been reached by a special demurrer. The trial proceeded as if they had concluded to the country and a *similiter* had been added by the plaintiff. To the objection now taken there are several answers. The irregularity is cured by the trial and verdict. *Coan v. Whitmore*, 12 Johns., 353; *Brazzel & Hawkins v. Usher*, Breese, 14; *Stone v. Van Curler*, 2 Vt., 115; *Sullivan v. Dollins*, 13 Ill., 88; *Coutch et al. v. Barton*, 1 Morris, 354. The objection comes too late; not having been made in the court below, it cannot be made here. It is within the thirty-second section of the judiciary act of 1789, which forbids a judgment to be reversed for any want of form in the proceedings, except such as shall have been specially pointed out by demurrer.

§ 1762. *An amendable defect in a verdict must be availed of in the court below.*

2. It is said that, conceding the issues intended to be made by the defendant were in fact submitted to the jury, the verdict does not respond to them; that it finds "the issue"—but one—and not designating which one, for the plaintiff. It was competent for the court to amend the verdict by changing the term "issue" from the singular to the plural. This would have removed the ground of the objection. A verdict, unless it be a special one, is always amendable by the notes of the judge. 1 Chitt. Pl., 411; Roulain v. McDowall, 1 Bay, 490; Norris v. Durham, 9 Cowen, 151; Sayre v. Jewett, 12 Wend., 135; Paul v. Harden, 9 Serg. & R., 23. The proper amendment would doubtless have been made below if the attention of the court had been called to the subject. Like the preceding objection, it is made here too late, and is within the act of congress referred to upon the subject of jeofails.

§ 1763. *An exception must be made to the admission of evidence.*

3. Upon looking through the testimony of Durand, as set out in the bill of exceptions, it appears that the admission of a part of it was objected to by the defendant, but it does not appear that the objection was overruled and exception taken. It only appears that the testimony was admitted after the objection was made. *Non constat*, but that the objection was waived or the decision acquiesced in. In order to make such a point available, it is necessary that an exception should be distinctly taken and placed upon the record.

§ 1764. *Instructions may be refused if those given cover the case.*

4. It was not error for the court to refuse to give the instructions asked for by the defendant, even if correct in point of law, provided those given covered the entire case, and submitted it properly to the jury. The defenses of false and fraudulent representations to the defendant and of the non-indorsement of the note involved mixed questions of law and fact. We think the law was properly stated by the judge, and the facts fairly submitted to the jury. The charge was full and able. It would throw no new light upon any legal principle, and could be productive of no benefit to examine in detail each of the numerous passages taken from the charge and made the subject of exception. It is sufficient to say that, after a careful examination of all of them, in the light of the context of the charge and of the evidence as it was before the jury, we have found nothing which we deem erroneous.

§ 1765. *Overruling motion for new trial not subject to review.*

5. An exception to the overruling of the motion for a new trial is found in the record, but is not adverted to in the argument submitted for the plaintiff in error. Such a decision cannot be made the subject of review by this court. The judgment below is affirmed.

RAILWAY COMPANY v. HECK.

(12 Otto, 120, 121. 1880.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—It does not appear from this record that any exceptions were taken in the progress of the trial to what was done by the court below. Nearly three weeks after the trial was concluded and a verdict rendered a motion was made for a new trial because of certain alleged errors in the charge; but it is nowhere shown that they were noted or brought to the

attention of the court before the verdict. Certainly no exceptions were taken. A trial court may, in the exercise of its judicial discretion, grant a new trial if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury.

§ 1766. *Exception must be taken before verdict.*

But not so with us. Our power is confined to exceptions actually taken at the trial. The theory of a bill of exceptions is that it states what occurred while the trial was going on. Time is usually given to put what was done into an appropriate form for the record; but, unless objection was made and exception taken before the verdict, no case is presented for a review here of the rulings at the trial. This has been settled in this court since *Walton v. United States*, 9 Wheat., 651. The cases are numerous to that effect.

§ 1767. *This court cannot review the judgment of a trial court on a motion for a new trial.*

We have uniformly held that, as a motion for new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here. *Schuchardt v. Allens*, 1 Wall., 359; *Insurance Company v. Barton*, 13 id., 603.

Judgment affirmed.

RAILROAD COMPANY *v.* VARNELL.

(8 Otto, 479-485. 1878.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vehicles or vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are in some respect less extensive and more qualified than in the latter, as the owners of the vehicle or vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety; but in most other respects the obligations assumed are equally comprehensive, and perhaps even more stringent. Common carriers of merchandise, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods and are liable at all events and for every loss or damage, unless it happened by the act of God or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without fault or negligence on the part of the carrier. *Propeller Niagara v. Cordes et al.*, 21 How., 23. Carriers of passengers even in street-cars are bound to a higher degree of care, skill and vigilance in the preparation and management of their vehicles of conveyance than were required of the owners of the stage-coaches, as well on account of the greater number transported at the same time as the constant ingress and egress of the persons entering or leaving the car. Travelers must take the risk necessarily incident to the mode of travel which they select; but those risks in the legal sense are only such as the utmost care, skill and caution of the carrier in the preparation and management of the vehicle of conveyance is unable to avert. *Pendleton v. Kinsley*, 3 Cliff., 420.

Prepayment of the usual fare having been made by the plaintiff, he entered the car of the defendants, as he alleges, for a passage from Washington to Georgetown, and on arriving at the depot of the latter place, and when being

in the act of getting off from the car, was thrown from the same upon the ground by the carelessness and negligence of the defendants, and was thereby greatly injured, so that he could not perform the usual duties of his employment; that in consequence of the injuries so received he was compelled to employ a physician at great expense, and was confined to the house for a long time, during which he suffered great pain and anguish. Suitable indemnity being refused, the plaintiff instituted the present suit to recover compensation for the alleged injuries and the consequent expenses. Service was made, and the defendants appeared and pleaded the general issue, which was subsequently joined by the plaintiff. The preliminary proceedings being closed, the parties went to trial, and the verdict and judgment were for the plaintiff in the sum of \$4,000, with costs of suit. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court for re-examination. Since the case was entered here, the defendants have assigned for error the following causes, for which they claim that the judgment should be reversed: 1. That the instructions of the court set forth in the first three exceptions are erroneous as to the supposed contributory negligence of the plaintiff. 2. That the court erred in the instruction given to the jury as to the measure of damages. 3. That the court erred in refusing the two prayers for instruction presented by the defendants, and in the instructions given in lieu of those prayers. 4. That the instructions given by the court to the jury were incoherent, contradictory and incomprehensible, and must necessarily have confused and misled the jury to the disadvantage of the defendants.

Evidence was introduced by the plaintiff tending to show that he, on the day and at the place alleged in the declaration, entered one of the cars of the defendants, and that he, having first paid his fare to the conductor, rode in the car to the terminus of the route in Georgetown, at the intersection of High and Bridge streets; that the car was then stopped at the usual place for passengers to leave and pass out; that several passengers had got off from the car, and that plaintiff started for that purpose, and having passed out of the rear end had stepped on the lower step of the car, and was about stepping to the ground when the car was suddenly started with a jerk, which threw him to the ground, his left hip striking the paved street, and that the thigh bone of his hip at the socket was dislocated and fractured by the fall; that the plaintiff was carried to his home, where he was confined to his bed for several weeks, and that he has ever since been compelled to walk with a cane, and has been unable to perform any labor, and that the injured leg is considerably shorter than the other; that he was sixty-four years of age at the time of the accident, and that up to that time he had always been healthy.

Witnesses were examined by the defendants, and they gave evidence tending to show that the plaintiff, just before the accident, was standing upon the rear platform of the car, and that he jumped from the car before it stopped, and that in jumping from the car he fell and was injured; that at the time of the accident the car had almost reached its usual stopping-place, and that the plaintiff, if he had waited a short time, could have alighted from the car in safety. Rebutting evidence contradicting that given by the defendants was also introduced by the plaintiff, and the bill of exceptions shows that in cross-examining one of the defendants' witnesses he laid the foundation to admit proof that the witness had made contradictory statements out of court. Proof to that effect was subsequently offered by the plaintiff; and in examining the witness called for that purpose the questions put were leading in form, to which

the defendants objected on that account, but the court overruled the objections, and having admitted the answers the defendants excepted. Three or four exceptions of the kind were taken; but inasmuch as the rulings of the court are not assigned for error, it will be sufficient to say upon the subject, that, if they had been assigned as error, it could not have benefited the defendants. More difficulty arises in disposing of the exceptions to the charge of the court, for two principal reasons: 1. Because the instructions are so framed as to render it somewhat uncertain what the principle of law is that the presiding justice gave, or intended to give, to the jury. 2. Because the exceptions are so general and indefinite that it is impossible to determine with certainty to what part of any one of the instructions any one of the exceptions refers. Three exceptions are embraced in the first assignment of error, and the complaint is that the court erred in failing to give the defendants the full benefit of their evidence as to the contributory negligence of the plaintiff. Turning to the record, it appears that the first exception to the charge of the court is addressed to nearly a page of the remarks of the presiding justice, with nothing to aid the inquirer in determining what the complaint is, beyond what may be derived from the exception, which is in the following words: "To which instruction the counsel for the defendants then and there excepted."

§ 1768. *Exceptions to the charge of the court must be specific.*

Much less difficulty would arise if the assignment of error contained any designation of the precise matter of complaint, but nothing of the kind can be obtained from that source. Certain portions of those remarks appear to be unobjectionable; as, for example, the judge told the jury that they must first determine whether the plaintiff was a passenger on the railroad of the defendants, and he called their attention to the testimony of the conductor, that the plaintiff was not in the car in which it seems he claimed that he had been riding just before he received the injury. Comments were made upon the testimony bearing upon that point, and the judge next stated to the jury to the effect that they must then determine from the evidence whether he fell off or got off, and was hurt in getting off, remarking that probably there was no dispute that he got hurt in falling from the car, but that the question was whether he, the plaintiff, was in fault, or whether the driver or conductor of the car caused the injury; adding that if it was the fault of the conductor, the company was responsible. If you come to the conclusion, said the judge, that the plaintiff acted in a neglectful manner in getting off from the car, or that he was in fault, he cannot recover; but if you come to the conclusion that it was the fault of the driver in starting too soon, or in not properly observing that the plaintiff was about to get off, and that the accident occurred in consequence of the too sudden starting of the car, the company is liable, if it was the fault of the driver or conductor.

Inaccurate language and, in some instances, incomplete sentences were employed by the judge; but the court is not able to see that any error of law was committed, or that the errors of language committed were of such a character as to warrant the conclusion that the jury were misled in respect to the legal rights of the parties; nor is the court here able to see that any remarks of the judge were of a character to withdraw any of the evidence from the proper consideration of the jury. Instead of that, he submitted it all to their determination, and then remarked that if they found that the injury received by the plaintiff was by the neglect of the railroad, then it would be their duty to

ascertain the extent of the injury from the evidence, to which no objection can properly be made. Reference was then made to the evidence, and comments of a general character followed; and at the close of the judge's remarks upon that subject is another exception, in the words following: "To which instruction the counsel for the defendants then and there excepted." Discussion of that exception may well be omitted, as the remarks made in respect to the preceding exception are believed to be sufficient to show that it is not sufficiently explicit, and that it must be overruled. Expert witnesses were called and examined in the case, and the third exception has respect to the remarks of the judge upon that subject. Neither the exception nor the assignment of error designates any particular remark of the judge as erroneous, and in view of the fact that the exception is addressed to the entire remarks as an instruction, the court is of the opinion that it requires no further examination.

Extended remarks were made by the judge upon the subject of damages, in case the jury came to the conclusion that the plaintiff was entitled to recover, to which two exceptions are appended, to the effect that the defendants then and there excepted to the remarks which preceded the note of exception. Exceptions put in that general form are certainly not entitled to favor; but it is proper to remark that those under consideration stand in a worse condition than those previously examined, for the reason that the attention of the judge after the charge was concluded was directed to many passages in his remarks as objectionable, every one of which the judge either corrected as requested, or, where the suggestion of error was in respect to the testimony, he referred the question to the recollection of the jury. Such corrections must, of course, be considered in connection with the antecedent remarks of the judge; and when that part of the charge is viewed in that light, the court is of the opinion that the exceptions must be overruled.

Two prayers for instruction were presented by the defendants: 1. That the court should instruct the jury that the plaintiff is not entitled to recover anything for the services of the physicians or other expenses, and there was no testimony to show the amount of money, if any, he had paid on that account. 2. That the court should instruct the jury that in estimating the damages of the plaintiff they must take into consideration his advanced age as lessening his capacity for earning money. Responsive to the first request, the judge remarked to the jury that there being no evidence on the subject of the specific amount of the physician's bill, "you will not take that into consideration, unless there is doubt," evidently leaving the sentence incomplete; but his attention was not called to the omission, and the court here is of the opinion that the defendants have no cause to complain of that part of the charge as an error at law. Both requests were refused, and in response to the second the judge remarked to the effect that the jury, acting reasonably, must ascertain the proper amount of the damages; that if they found damages, they must be reasonable, as they could not tell whether a man would live one, two, or five years. Probably no one will think that these remarks of the judge were very instructive to the jury; but it is not possible to hold that they show any legal error for which the judgment should be reversed.

Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court; but in every such case the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that be done, the exception cannot

be sustained as a ground for reversing the judgment, as that can only be done for error of law. For these reasons, the court is of the opinion that there is no error in the record.

Judgment affirmed.

§ 1769. **Must except at the time.**—A party complaining of errors in a lower court must show that he excepted at the time. *Garvey v. Schollkopf*,* *McCahon*, 179; *Brown v. App.*,* *McCahon*, 174; *Locke v. United States*, 2 Cliff., 583. See § 1909.

§ 1770. **Must be taken in the court below.**—No objection will be considered which was not taken in the court below. *Morrill v. Jones*, 16 Otto, 467; *Walker v. Sauvinet*, 2 Otto, 93; *Badger v. Raulett*, 16 Otto, 259; 12 Otto, 574. No exception can be taken in the supreme court which was not moved below, or which does not appear in some way on the record below. *Barrow v. Reab*, 9 How., 370. See §§ 1749-1752.

§ 1771. Where nothing appears on the record to show that exceptions were taken, the appellate court will presume that the judgment is correct. *Searcy v. Hogan*,* *Hemp.*, 20.

§ 1772. Where there are no exceptions in the record, the supreme court will not decide the case by reference to exceptions found in another case, even by consent of parties. *Bradstreet v. Potter*,* 16 Pet., 317.

§ 1773. An exception which, during the progress of the trial, becomes wholly immaterial, cannot be assigned for error. *Philadelphia, Wilmington, etc., R'y Co. v. Howard*, 13 How., 332.

§ 1774. Where upon a writ of error to a district court the record presents a large number of exceptions, most of them worthless, and a few exceptions can be selected on which the merits of the case depend, only these points will be considered, and errors in the other exceptions will be disregarded. *Randon v. Toby*, 11 How., 517.

§ 1775. On a libel to recover for repairs on a vessel, it was held that the point could not be taken for the first time on appeal that the repairs were made on the vessel in her home port, and therefore did not create a maritime lien. *Meagher v. The Steamboat Lizzie*,* 2 Woods, 243.

§ 1776. On a writ of error from the circuit to a district court in a criminal case under the act of March 3, 1879, only the decisions of the district court which are excepted to in that court can be reviewed. *Brand v. United States*, 18 Blatch., 389; S. C., 4 Fed. R., 398.

§ 1777. Though it is a general rule that the supreme court will not consider objections not taken in the court below, yet where the record shows a combination of errors of such gravity and importance as to justify it, such errors will be considered and the decree reversed. *Washington Railroad v. Bradleys*, 10 Wall., 303.

§ 1778. Exceptions are necessary only when the alleged error could not otherwise be made to appear upon the record; an order reviving a suit may therefore be reviewed by the supreme court, though the plaintiffs in error failed to appear in the circuit court and to object to the action of the court in making such order. *Macker v. Thomas*, 7 Wheat., 532.

§ 1779. Where the whole record is before the appellate court, any exception appearing on it can be taken by counsel which could have been taken below. *Garland v. Davis*, 4 How., 143.

§ 1780. In an action upon an assessment under the revenue laws, the supreme court will not consider the objection that the assessment is too indefinite and uncertain if taken there for the first time. *Bergdall v. Pollock*, 5 Otto, 338.

§ 1781. **Findings.**—An objection that the court did not separate its findings of fact from its conclusions of law cannot be made for the first time in the supreme court. *Clark v. Fredericks*,* 15 Otto, 4.

§ 1782. **Misnomer.**—An objection based upon a misnomer of one of the parties comes too late in the appellate court. *Breedlove v. Nicolet*, 7 Pet., 431.

§ 1783. **Verdict.**—An objection that the jury failed to respond separately to the distinct issues presented by the pleadings, which was not taken on the trial nor prominently presented upon the record of the court below, but which was sprung upon the opposite party after an apparent waiver thereof, can claim no favor in the supreme court, and will be entertained only on the strictest requirements of the law. The verdict in this case substantially determining the issues, the objection is a merely technical one, and is cured by the statute of jeofails, and the objection will not be considered. *Roach v. Hullings*, 16 Pet., 321.

§ 1784. A party not excepting to a verdict in the court below cannot question it in the appellate court. *Campbell v. Strong*, *Hemp.*, 267.

§ 1785. A judgment in the district court, which is insufficient for the reason that not all the material facts were disposed of by the verdict, will be reversed by the territorial supreme court though the objection is made for the first time in that court. *Hall v. Van Eps*,* 1 Dak. T., 223. (Cited and approved, *Dole v. Burleigh*, 1 Dak. T., 234.)

§ 1786. **Limitations.**— Where the defendant sets up exceptions setting forth the statute of limitations, and also the pendency of another suit, and at the same time answers and goes to trial on the merits, the exceptions must be held by the appellate court to have been waived by thus going to trial. *Kittredge v. Race*, 2 Otto, 121.

§ 1787. The question whether the statute of limitations bars a cause of action cannot be raised for the first time in the appellate court; and this though the petition in the court below might have been demurred to for the reason that it did not state facts sufficient to constitute a cause of action. *Upton v. McLaughlin*, 15 Otto, 644.

§ 1788. Where the statute of limitations is pleaded as a bar in a suit in equity, an exception thereto must appear in the bill, or in a reply, or by an amendment to the bill, and if it is not so pleaded the supreme court, upon an appeal from the decree, will not consider the evidence introduced to show such exception. *Piatt v. Vattier*, 9 Pet., 415.

§ 1789. **Pleadings.**— The objection in a collision case that the libel is too general in its terms, and is defective because not stating the particular acts of negligence and misconduct on the part of the vessel alleged to be in fault, cannot be taken for the first time in the supreme court. An omission in admiralty to state facts which prove to be material, and which cannot have surprised the claimant, will work no injury to the libellant where no design to injure by such omission is shown. *The Quickstep*, 9 Wall., 670.

§ 1790. Where in an admiralty suit exceptions were taken to the form of the libel in the district court, but the appeals to the circuit court and from the circuit court to the supreme court are silent as to such exceptions and contain no reference to them, either expressly or by implication, and they were not considered by the circuit court, they must be considered as waived. For the supreme court to consider them would be an exercise of appellate power over the decision of the district court. *The Vaughn and Telegraph*, 14 Wall., 265.

§ 1791. Though the answer of the claimant in a case in admiralty is not full, clear, explicit and distinct as to each article and allegation of the libel, yet where such objection was not taken in the court below, and was not noticed upon the argument, the supreme court will still decide the case upon the merits. *Commander-in-Chief*, 1 Wall., 48.

§ 1792. The petition in a case demanded interest on the claim set forth at the rate of eight per cent., and the defense of usury was not set up by the defendant. No exception being taken to the decision of the court, the judgment of the court must be taken by the supreme court to be correct. *Newell v. Nixon*, 4 Wall., 583.

§ 1793. The objections that no leave was given to file an amended bill in an equity case, and that there was no replication in a case, cannot be taken for the first time in the supreme court. If not made in the court below they are waived, and they are besides within the statute of jeofails. *Clements v. Moore*, 6 Wall., 310.

§ 1794. The declaration in an action by an alien contained no allegation that the defendant was a citizen of one of the United States, but the plaintiff inserted such allegation in a joinder in demurrer. After several years' litigation, no objection having been made on account of the want of such an allegation in the declaration, the supreme court refused to dismiss a writ of error brought to review the judgment of the court below, on the ground that under the circumstances the objection was waived. *Bradstreet v. Thomas*, 12 Pet., 62.

§ 1795. It is too late to allege as error in the supreme court a fault in the declaration which ought to have prevented the rendition of the judgment in the court below. *Slacum v. Pomery*, 6 Cr., 225.

§ 1796. An objection that there is no replication to the answer in a suit in equity cannot be taken for the first time in the supreme court where the record shows that proofs were taken. The court in such a case will presume that the case was considered on the proofs, and not on the bill and answer, and that consequently the informality of the lack of an answer was waived. *Fretz v. Stover*, 22 Wall., 203.

§ 1797. **Form of the decree.**— Exceptions to the form of the decree in a salvage case must be made in the district court if the objector intends to rely on the same. *The Blackwall*, 10 Wall., 13.

§ 1798. **Variance.**— An objection to a variance between the pleadings and the proof cannot avail the opposite party as an error in the supreme court, if not taken in the court below at the time the testimony was given. It is too late to wait till instructions to the jury are requested. *Roberts v. Graham*, 6 Wall., 581.

§ 1799. An objection that there is a fatal variance between the facts found by the court and those stated in the plaintiff's petition will not be considered by the supreme court where no objection was taken to the admission of testimony on the trial or at the time of the announcement of the findings and judgment of the court below. *Railroad Company v. Lindsay*, 4 Wall., 656.

§ 1800. An exception to the judgment of a circuit court on the ground of a variance between the pleadings and the proof will be disregarded when it is not alleged that the findings

were not according to the proofs, nor that the judgment is not according to law and justice as the case is presented. *Railroad Company v. Lindsay*, 4 Wall., 656.

§ 1801. A variance not excepted to in the circuit court for the District of Columbia cannot be considered by the supreme court upon a writ of error to that court. *Gorman v. Lennox*, 15 Pet., 117.

§ 1802. **Amendments.**—Where no objection has been taken in the court below to the allowance of an amendment, the supreme court must presume that it was waived. *Chirac v. Reinicker*, 11 Wheat., 302.

§ 1803. **New trial.**—Exceptions to the refusal of the lower court to grant a new trial cannot be considered by the supreme court on a writ of error. *Brown v. Clarke*, 4 How., 15.

§ 1804. When a party wishes the action of the lower territorial court reviewed upon a writ of error, for the refusing or granting of a new trial, the admission or rejection of evidence, or for refusing to give instructions prayed for, or to the charge of the court, he must except or object, as the case may be, at the time, and have the same noted by the judge, or else they will not be regarded by the supreme court. *Blumberg v. McNear*,* 1 Wash. Ty., 162.

§ 1805. **Form of action.**—An objection that the plaintiff has made a mistake in the form of his action, which was not taken in the lower court, cannot be made for the first time in the supreme court; and though it clearly appear that an improper form was chosen, still the judgment, if other valid objections do not exist, must be affirmed. *Marine Bank v. Fulton Bank*, 2 Wall., 258.

§ 1806. **Feigned issue.**—Where in a circuit court a feigned issue was awarded in an equity case, and on the return of the issue to the court in equity no exceptions were taken to the verdict or to the ruling of the court, no exceptions thereto can be considered by the supreme court on appeal from the decree. In such a case only the opinions of the court sitting in chancery can be reviewed. All points arising on the trial of the issue must be reviewed by the court ordering the issue, before they can be reviewed by the appellate court. *McLaughlin v. Bank of Potomac*, 6 How., 227. See § 1748.

§ 1807. **Witness.**—Where a witness releases his interest to make himself a competent witness, and no objection is taken at the time to the execution of the release, it is too late to object to it in the appellate court. *Downey v. Hicks*, 14 How., 247.

§ 1808. **Land claim, fraud.**—In the case of a suit against the United States on a land claim founded on a Mexican grant, a suggestion of fraud not made either before the board of land commissioners or the district court will not be heard for the first time in the supreme court. *United States v. Larkin*, 18 How., 561.

§ 1809. **Jurisdiction.**—It is not necessary that the question of jurisdiction be made the subject of an exception, if it is patent on the face of the record. *Piquignot v. Pennsylvania R'y Co.*, 16 How., 105.

§ 1810. Where an assignee in bankruptcy goes into a state court and submits to its jurisdiction without objection, either in the inferior court or in the supreme court of the state, the objection that the state court had no jurisdiction cannot be considered by the supreme court of the United States. *Mays v. Fritton*, 20 Wall., 418.

§ 1811. And where he voluntarily submits himself and his rights to the jurisdiction of the state court without objection, and without an effort to remove the cause to the federal courts, it is too late on writ of error to object to the power of the state court to act in the premises. *Scott v. Kelly*, 22 Wall., 59.

§ 1812. The objection that the district court has no jurisdiction in proceedings in case of a seizure under the laws of impost, navigation and trade, may be taken for the first time in the circuit court on appeal. *The Fideliter*, 1 Abb., 578.

§ 1813. When a case has been before the supreme court on a writ of error, and has been disposed of on the merits, and the mandate of the court requires only the execution of its decree by the court below, it is then too late to question the jurisdiction of the lower court. *Skilern v. May*, 6 Cr., 268.

§ 1814. On appeal from a circuit court in an equity case, if an alleged defect of jurisdiction is not taken advantage of by plea or answer, it cannot be raised in the supreme court for the first time, unless apparent on the face of the bill. *Wylie v. Coxe*, 15 How., 420.

§ 1815. **Void devise.**—It seems that the objection that a devise is void, because of the alienage of the devisee, cannot be made for the first time in the supreme court, though the judgment of the court below discloses the fact that the party is an alien. *Scholey v. Rew*, 23 Wall., 350.

§ 1816. **Waiver.**—Exceptions taken in a trial court are not waived by a motion for a new trial. *United States v. Dashiell*, 4 Wall., 185.

§ 1817. Where a case has been sent from the circuit to the supreme court, and the defendant in error appears in the latter court, and the judgment is reversed and remanded to the

circuit court, it is then too late for the defendant in error to object that there was no writ of error from the circuit court, and that consequently the proceedings there were of no effect, and that the judgment of the circuit court is in full force and effect, and unreversed. *Evans v. Eaton*, 3 Wash., 443.

§ 1818. Where a case is improperly removed from the district court by *certiorari*, and without objection the defendant enters his appearance in the circuit court, and a trial is there had, he cannot after verdict object that the cause was improperly removed; and the supreme court on a writ of error to the circuit court will consider the action as originally brought in the circuit court by consent. *Patterson v. United States*, 2 Wheat., 226.

§ 1819. The objection in admiralty proceedings, that only one surety signed the stipulation to stay execution on appeal, is waived by allowing a term at which it might have been made to intervene. Irregularities of proceeding known to the party concerned must be objected to at the first legal opportunity in court, after the time of its occurrence. *The Infanta*, Abb. Adm., 329.

§ 1820. A claim in reconvention in an answer under the Louisiana practice does not waive an exception previously taken to the jurisdiction of the court. *Peale v. Phipps*, 14 How., 376.

§ 1821. Where a bill in equity is founded on the fact of the loss of a deed, and no affidavit is annexed to the bill to that effect, and no demurrer is interposed, but an answer is filed and the parties go to trial on the issue, the objection that such affidavit is wanting is waived, and furnishes no sufficient cause for the reversal of the decree on appeal. *Findlay v. Hinde*, 1 Pet., 244.

§ 1822. Pending a motion for a new trial in the circuit court, an execution was issued to collect that part of the judgment which was admitted to be proper, without prejudice to the plaintiffs' right to recover the balance. No objection was made by the defendant at the time, and the defendant appears to have sustained no injury in consequence. On the new trial which was granted, the controversy was limited to the amount claimed in excess of the amount for which execution was issued, which the order stated "was admitted by the defendant to be due the plaintiffs." *Held*, that the supreme court must presume that the execution was issued with the assent of the defendant. *Planters' Bank v. Union Bank*, 16 Wall., 498.

§ 1823. *Depositions.*—No objection to the admission of a deposition can be taken in the supreme court on appeal which was not taken in the court below; and especially where the witness was cross-examined by the opposite party, which was in itself a waiver of the irregularity. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 307; *Gaines v. Relf*, 12 How., 530.

§ 1824. Before the trial the defendants moved to suppress a deposition of the plaintiff taken *de bene esse*, but the deposition was offered and read on the trial without objection on the part of the defendant. *Held*, that it must be presumed that the objection was waived, and the supreme court will not entertain an objection that it should not have been received. *Ray v. Smith*, 17 Wall., 417.

§ 1825. The objection of a party in the court below to certain depositions, without stating any specific ground of objection, is vague and nugatory, and will not be considered by the appellate court. *Camden v. Doremus*, 3 How., 530.

§ 1826. *Parties.*—An objection that a particular item in an account could not be recovered on account of the non-joinder of a party cannot be made for the first time in the supreme court. *Wheeler v. Sedgwick*,* 4 Otto, 1.

§ 1827. Objections to modes of procedure in the court below cannot be urged for the first time in the supreme court. So where the receiver of a national bank appeared in a suit in a state court, and moved to discharge an attachment and to abate the suit, and no question was raised as to his right so to appear, it was held that such objection could not be made in the supreme court. *National Bank v. Colby*, 21 Wall., 614.

§ 1828. An appellant cannot have a decree reversed because other parties have received allowances of the same kind that he received, all the parties being creditors of equal degree, and the objection being raised for the first time in the supreme court. *Terry v. Abraham*, 3 Otto, 38. See the case, §§ 1605-7.

§ 1829. An objection for want of parties in an equity suit which does not appear on the face of the bill, and which was not made in the court below, cannot be made for the first time in the supreme court on appeal. *Carey v. Brown*, 2 Otto, 172.

§ 1830. An objection to the misjoinder of parties plaintiff in a bill in equity, which nowhere appears upon the pleadings, or appears to have been urged before the final decree, will not be considered by the supreme court on appeal. The objection comes too late to be of any avail, and should not affect the cognizance of the court either as to the parties or as to the subject matter. *Livingstone v. Woodworth*, 15 How., 556.

§ 1831. On an appeal in an admiralty case to the supreme court, an objection for the non-joinder of parties libellant cannot be taken for the first time. *Commander-in-chief*, 1 Wall., 51.

§ 1832. The objection that the parties to an amended bill should have been made parties to a supplemental bill in the same action, if not taken below will not be considered by the supreme court on appeal. To hold otherwise would be for the supreme court to exercise original instead of appellate jurisdiction. *McBurney v. Carson*, 9 Otto, 569.

§ 1833. Where a decree confirming a survey is made in proceedings in the district court for the confirmation of a Mexican grant, and a party is allowed by the district court to intervene, and for the purpose of testing the correctness of the decree, the objection cannot be taken for the first time in the supreme court on appeal that such intervenor has not sufficient title to enable him to be heard to object to the survey. *Alviso v. United States*, 8 Wall., 340.

§ 1834. Reference.—The fact that the report of a referee did not find facts positively, but only inferentially, cannot be assigned for error if no objection was made in the court below. *Lumber Company v. Buchtel*, 11 Otto, 637.

§ 1835. On a writ of error from the circuit to the district court, where the action was tried below before a referee, his findings of fact are conclusive. Only his findings of law can be questioned, and these only so far as they are challenged by exceptions properly taken and filed in the court below. *Sicard v. Buffalo, N. Y. & Phila. R'y Co.*, 15 Blatch., 526.

§ 1836. The objection that only two of the three referees in the court below signed the award cannot be taken for the first time in the supreme court. *Newcomb v. Wood*, 7 Otto, 583.

§ 1837. Commissioner in admiralty.—Objections to the allowance and report of a commissioner in admiralty cannot be made for the first time in the circuit court. *Harris v. Wheeler*,* 8 Blatch., 1.

§ 1838. Objections to the amount of damages awarded by the commissioner in an admiralty case will not be entertained by the supreme court upon appeal unless notice thereof was given in the court below by proper exceptions to the commissioner's report. Parties must present their objections at the stage of the litigation where errors, if any, may be corrected without inconvenience and unnecessary expense; and failing to do so without just excuse, they must be understood as having acquiesced in the decision of the court. *The Vanderbilt*, 6 Wall., 230.

§ 1839. It is not necessary, in the case of an appeal from a decree in admiralty confirming the report of auditors, to take exceptions to such report, if the errors complained of appear on its face. *Himely v. Rose*, 5 Cr., 316.

§ 1840. If exceptions have not been taken to the report of auditors in admiralty proceedings, only those errors which are apparent on the face of the report will be considered on appeal to the supreme court from the decree affirming the report. *Himely v. Rose*, 5 Cr., 316.

§ 1841. Exceptions to the report of a commissioner in an admiralty proceeding will not be noticed unless they are sufficiently definite, and are accompanied by such particulars that the supreme court, with a reasonable examination of the record, can pass upon their sufficiency. For example, an objection that the commissioner admitted improper and immaterial evidence, without showing what such evidence was, is insufficient; so also that there was not sufficient evidence to justify the finding when the evidence is not reported; and that witnesses who were incompetent were allowed to testify, when their names and evidence are omitted and the reason why they are incompetent is not set forth. *Commander-in-chief*, 1 Wall., 50.

§ 1842. Master's report.—An exception to a master's report cannot be made for the first time in the supreme court. *Hudgins v. Kemp*,* 20 How., 54; *West v. Smith*, 8 How., 410; *McMicken v. Perin*, 18 How., 510.

§ 1843. On appeal from the decree of the circuit court in bankruptcy proceedings, exceptions not taken below to the report of the master will not be considered by the supreme court. *Hudgins v. Kemp*, 20 How., 53; *S. C.*, id., 55.

§ 1844. The error of a master in chancery in stating an account should be excepted to in the court below before the confirmation of the report, and if not so excepted to, the objection cannot be taken for the first time in the supreme court on appeal. *Kinsman v. Parkhurst*, 18 How., 294.

§ 1845. An exception to the ruling of a master in chancery should always be taken at the time. It need not be drawn up in form, but notice should be given to the master, and it is his duty to note the fact of the exception in his minutes. *Troy Iron & Nail Factory v. Corning*, 6 Blatch., 331.

§ 1846. Where a master in chancery admits evidence, and reserves the objection for decision at a later time, and then neglects to pass upon the objection, or decides it incorrectly, an objection should be taken for that reason at the time of the service of the draft report. It is too late to take such exceptions at the final report. *Troy Iron & Nail Factory v. Corning*, 6 Blatch., 332.

§ 1847. Exceptions to the report of a master in chancery should not be framed so as merely to allege error in general terms, but should be sufficiently definite and explicit to enable the court to decide upon the point understandingly; and the party excepting should require the

master to state the evidence that furnishes the ground of the exception, and if this is not done the court will not enter into an examination of the evidence at large to ascertain the correctness of the master's conclusion. *Greene v. Bishop*, 1 Cliff., 191.

§ 1848. In a suit in equity in the circuit court the matter was referred to a master. According to a rule of the court each party had a certain time to file exceptions thereto, and if exceptions were not filed the report was to be held conclusive. No exceptions were filed, but the circuit court disallowed a part of the master's findings. *Held*, that no exceptions being taken to the master's report, it is binding on the supreme court on appeal the same as on the court below, and cannot be questioned. *Canal Company v. Gordon*, 6 Wall., 568.

§ 1849. Where, in pursuance of the mandate of the supreme court, the circuit court refers a case to a master to take an account of rents and profits, and the master has followed the mandate of the supreme court and enforced its provisions, no objection can be taken on appeal to what he has done when the appeal arises on exceptions to his report. *New Orleans v. Gaines*, 15 Wall., 629.

§ 1850. Where a chancery suit involves matters of account, the action of a master should be had in the inferior court, and the items admitted or rejected should be stated, so that exceptions may be taken to the particular items or class of items, and such a case should be brought before the supreme court on the rulings of the court on these exceptions. *Ransom v. Winn*, 18 How., 297.

§ 1851. Where the report of the commissioner in a suit in equity was excepted to on the ground that it was contrary to the evidence, "and for other reasons to be stated more particularly at the hearing," and the record shows simply that the exception was overruled, the supreme court upon appeal will not presume that it was overruled on account of a defect or insufficiency in form, but that it was overruled on the merits as being contrary to the evidence. *Withers v. Withers*, 8 Pet., 359.

§ 1852. Instructions.—Where a series of propositions are presented to the court as a whole as instructions to the jury, and the court refuses them as a whole, and an exception is taken to such refusal, the judgment will not be reversed if one of the propositions was erroneous. *Worthington v. Mason*, 11 Otto, 149; *Beaver v. Taylor*, 3 Otto, 54; *Rogers v. The Marshal*, 1 Wall., 654; *Harvey v. Tyler*, 2 Wall., 338. See §§ 1754-1756.

§ 1853. Exceptions to the charge of the court should not be general to the whole charge as given, but special to each of the points excepted to. Under the peculiar circumstances of this case, however, the writ of error was not dismissed, but the case was considered on its merits. *Stimpson v. West Chester R'y Co.*, 4 How., 401.

§ 1854. Where no exceptions have been taken to the instructions given to the jury in the court below, the appellate court will presume that the law was correctly stated. *Gove v. Moses*,* 1 Wash. Ty., 15.

§ 1855. It seems that appellate courts will not consider exceptions to instructions which were not taken at the time they were given, or at least before the verdict, unless time has been given by the court. *Cheatham v. Wilber*,* 1 Dak. T., 347.

§ 1856. An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variances, cannot be sustained. It is not the duty of a judge of the circuit court, or of an appellate court, to analyze and compare the requests and the charge to discover what are the portions thus objected to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if, in his judgment, it would be proper to do so. *Beaver v. Taylor*, 3 Otto, 55.

§ 1857. When the instructions of the court have not complied with the prayers of either party, they are to be considered as refused, and exceptions will lie to the refusal of the court to give instructions requested in like manner as to instructions actually given. *Emerson v. Hogg*, 2 Blatch., 7.

§ 1858. Evidence.—An objection to the admission of a deed in evidence, which was not taken in the circuit court, will not be reviewed by the supreme court on writ of error. *Springer v. United States*, 12 Otto, 593. See § 1753.

§ 1859. If the record does not show that an exception was taken below to a question asked upon the trial, an exception based thereon will not be considered by the supreme court upon a writ of error. *Schuchardt v. Allens*, 1 Wall., 367.

§ 1860. Where a question objected to was proper and pertinent, no objection to the answer will be considered if not taken in the court below. *Rogers v. The Marshal*, 1 Wall., 654.

§ 1861. Where no objection was made in the circuit court to the admission of a deed in evidence, no objection to its execution can be made in the supreme court on error. *Stoddard v. Chambers*, 2 How., 315.

§ 1862. Where no objection was taken in the court below to the admission of evidence under the general counts, which tended to show a special contract made by a corporation, an

objection that there is not legal proof of such contract comes too late in the appellate court. *Chesapeake & Ohio Canal Co. v. Knapp*, 9 Pet., 565.

§ 1863. The supreme court in an action of ejectment will not consider objections to documentary evidence of title not made in the court below; at least if they are of a kind which might have been there obviated. *Houghton v. Jones*, 1 Wall., 705.

§ 1864. In proceedings for the confirmation of Mexican grants, objections taken for the first time in the supreme court to the proof of authentication will not be considered. It is no part of the duty of the counsel for the government to urge microscopic objections to the claimant's title, or to enforce a forfeiture for the non-observance of some formality prescribed at common law. If there is any just suspicion of fraud or forgery, evidence to support the charge should appear on the record. *United States v. Johnson*, 1 Wall., 328.

§ 1865. In actions to confirm the title conferred by Mexican grants, if the preliminary proceedings are preserved in the government archives, the supreme court, upon appeal from the district court, will presume that the execution of the grant is sufficiently proved, where it is signed by the governor and secretary, unless objection is made to the sufficiency of the proof in one of the lower tribunals. *United States v. Yorba*, 1 Wall., 422.

§ 1866. In cases concerning Mexican grants, objections to the execution of documents relied on to support the title should be taken in the court below, or before the commissioners. They cannot be taken in the supreme court for the first time. *United States v. Auguisola*, 1 Wall., 357.

§ 1867. Where a party objects to the admission of evidence, and the objection is overruled, with an intimation that the point would be considered on a motion for a new trial, and no exception is taken, the appellate court will presume that the point is waived as a matter of error, and insisted on only as matter for a new trial. *Poole v. Fleeger*, 11 Pet., 211.

§ 1868. Where a discrepancy between the water mark in the paper and a document written thereon, which was offered in evidence to support a title, was not noticed at the hearing, nor commented upon by counsel in their arguments in the court below, such discrepancy will not be noticed by the supreme court, though commented upon at large by the judge of the court below in his opinion. *Mitchell v. United States*, 9 Pet., 731.

§ 1869. Although at the time of putting a question the opposite party objected, and said he excepted, the exception will not be noticed by the supreme court, but will be considered as abandoned, unless an exception is actually prayed by the party and signed by the judge. *Scott v. Lloyd*, 9 Pet., 442.

§ 1870. A defendant in error in the supreme court cannot take advantage of an alleged improper admission of a copy of a contract in evidence in the court below to which the plaintiff in error did, and he did not, except. *Greenleaf v. Birth*, 9 Pet., 296.

§ 1871. Where accounts were admitted in evidence in the circuit court, and form part of the record on a writ of error from the supreme court, they cannot be stricken from the record if no objection was taken to their admission in the court below. *Hinde v. Longworth*, 11 Wheat., 211.

§ 1872. Exceptions to the admission of evidence, although they need not be put into form and signed at the trial, but may be drawn out and signed within a time prescribed by the rules and practice of the court, yet, if not taken at the time of the trial, they are deemed to be waived. *Poole v. Fleeger*, 11 Pet., 211.

§ 1873. To render an exception available in the supreme court, it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. If the exception is to the refusal of an interrogatory not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material. *Railroad Company v. Smith*, 21 Wall., 261.

§ 1874. Nothing which occurred in the progress of the trial in the inferior court can be assigned for error in the supreme court which was not brought to the attention of the court, and decided by it. So where specific objections are made to the admission of evidence, the court has a right to presume that all others are waived, and proceed with the case accordingly. *Belk v. Meagher*, 14 Otto, 288. And where the only objection specified to the admission of a deed was that it was incompetent, immaterial and irrelevant, the objection that the attestation of the copy was insufficient cannot be considered by the appellate court. *Wood v. Weimar*, 14 Otto, 795.

§ 1875. It is the duty of a party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. So where testimony was taken under a commission, and on its production in court at the trial objections were taken to its competency and relevancy, but were general and indefinite, and did not point out the portions objected to except in gross, and the parts so pointed out contained competent and relevant

testimony, it was held by the supreme court that the objections were properly overruled. *United States v. McMasters*, 4 Wall., 682.

§ 1876. It is the duty of a party taking exceptions to the admissibility of evidence to point out the part excepted to, when the evidence consists of a number of particulars, so that the attention of the court may be drawn to the particular objection. Where, in such case, the exception is taken generally, if any of the matter is admissible the objection must be overruled. *Moore v. Bank of Metropolis*, 13 Pet., 310.

§ 1877. And if he assign no grounds for his exception, the mere objection cannot avail him in the appellate court. *Burton v. Driggs*, 20 Wall., 133.

§ 1878. The appellate court, in its examination of the admissibility of evidence, ought to confine the parties to the specific objections taken by them in the court below. If the attention of the trial court is called to the testimony in one point of view only, to admit inquiry afterwards whether the evidence might not have been admissible for some other purpose would be to sanction a practice calculated to mislead. *Hinde v. Longworth*, 11 Wheat., 209.

§ 1879. It is incumbent upon a party excepting to the admission of evidence to make out the error of the court clearly and satisfactorily. All reasonable intendments should be made in favor of the judgment, and where the exception is so vague and unintelligible that the supreme court cannot see clearly that the testimony was incompetent, the judgment will not be reversed. *Ventress v. Smith*, 10 Pet., 170. See § 1722.

2. Bill of Exceptions.

SUMMARY—*How error may be shown*, § 1880.—*Error apparent on the record*, §§ 1881, 1890.—*Report of evidence signed by the judge*, § 1882.—*Turning case into special verdict*, § 1883.—*No error on the record*, §§ 1884, 1894.—*Actions at law*, § 1885.—*Instructions*, § 1886.—*Appeals in admiralty*, § 1887.—*As to findings by the court*, § 1888.—*Should not raise questions of fact*, § 1889.—*Case not dismissed for want of*, § 1890.—*Objections to evidence*, § 1891.—*Certificate of clerk in lieu of*, § 1892.—*Depositions and affidavits*, § 1893.—*Objections on an inquisition of damages*, § 1895.—*Paper, how incorporated*, 1896.—*Memoranda by the clerk; exceptions must be signed and sealed*, § 1897.—*Ruling on demurrer*, § 1898.—*Grounds on which a motion was made or denied*, § 1899.—*Error as to time of taking an exception*, § 1900.—*Presumption where evidence is rejected*, § 1901.—*Cases tried without a jury*, § 1902.—*Need not be sealed*, § 1903.—*Not purporting to give all the evidence*, § 1904.—*Filed nunc pro tunc*, § 1905.—*Time of taking and filing*, §§ 1905-1909, 1912, 1913, 1916.—*Form of bills*, §§ 1910, 1911.—*Filed after allowance of writ of error*, § 1914.—*Not governed by state laws*, § 1915.—*Time of filing in admiralty*, § 1916.

§ 1880. To authorize a review on writ of error, the error must be apparent of record, and is usually shown by bill of exceptions, special verdict, or an agreed statement of facts. (The various methods by which error may be shown, the nature of a special verdict, etc., discussed.) *Suydam v. Williamson*, §§ 1917-1930. See § 1986.

§ 1881. Whenever error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner. *Ibid.*

§ 1882. A report of the evidence incorporated into the transcript, and signed by the judge, is not a bill of exceptions, agreed statement of facts, or special verdict, and will not be considered by the supreme court. *Ibid.*

§ 1883. A case cannot be turned into a special verdict without leave of court. *Ibid.*

§ 1884. On writ of error to a federal court, if there are no errors in the record the judgment will be affirmed. (Of the practice on writs to state courts.) *Ibid.*

§ 1885. An action at law will not be reviewed on writ of error where there is no bill of exceptions, and no point as to the admissibility of the evidence is raised, though the whole of the evidence appears in the record. The practice does not differ in cases brought up from Louisiana. *Minor v. Tillotson*, § 1931.

§ 1886. With no issue made directly by the pleadings, and no evidence set forth or referred to in the bill of exceptions showing the materiality of the charge complained of, the case presents only an abstract proposition of law which may or may not have been in a way injurious to the plaintiff in error. *Jones v. Buckell*, §§ 1932, 1933. See § 2061.

§ 1887. Congress has the constitutional power to confine the jurisdiction of the supreme court on appeals in admiralty to questions of law arising on the record, and the act of February 16, 1875, c. 77, is, therefore, constitutional. *The Francis Wright*, §§ 1934-1937.

§ 1888. If the court refuses to make a finding on a material question of fact, when evidence has been introduced on the subject, or proceeds to find, against remonstrance, a material fact which is not supported by any evidence whatever, and an exception is taken, a

bill of exceptions may be used to bring the ruling up for review. But the rule does not apply to mere incidental facts, which only amount to evidence bearing upon the ultimate facts of the case. *Ibid.*

§ 1889. A bill of exceptions should not be framed with a view to securing a re-examination of the facts. It should state and point out distinctly the errors complained of, and ought also to show the grounds relied on to sustain the objection presented, so that it may appear that the court below was properly informed as to the point to be decided. *Ibid.*

§ 1890. A writ of error will not be dismissed on motion for want of a bill of exceptions; the party may show that there is error in the record. *Minor v. Tillotson*, § 1938. See § 2012.

§ 1891. An objection to the sufficiency of the evidence must be made below; and where the court below finds the facts, the sufficiency of the evidence cannot be questioned in the supreme court, unless upon a bill of exceptions properly taken. *Cucullu v. Emmerling*, § 1939.

§ 1892. On writ of error to a state court, the certificate of the clerk that certain papers were offered in evidence, and the statement of counsel upon a motion for a new trial that certain instructions were refused, will not be received in lieu of a bill of exceptions. These facts should be authenticated by the court. *Reed v. Marsh*, §§ 1940, 1941. See §§ 1975, 1986.

§ 1893. Neither depositions nor affidavits, though appearing in the transcript of a common law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions. *Baltimore, etc., R. Co. v. Trustees*, §§ 1942-1946.

§ 1894. Though a writ of error removes the judgment for re-examination, yet if the transcript does not show that any error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mis-trial. *Ibid.*

§ 1895. It seems that objections taken on an inquisition of damages may be saved by a bill of exceptions. *Ibid.*

§ 1896. A paper does not become a part of a bill of exceptions by being attached to a pleading; where a paper is not incorporated into the body of a bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions. *Leftwitch v. Lecanu*, § 1947.

§ 1897. Mere memoranda on the minutes of the clerk, to the effect that certain proceedings were had, and that the parties excepted, cannot be used in place of a bill of exceptions; to be of any avail, exceptions must not only be drawn up so as to present distinctly the rulings of the court, but they must be signed and sealed by the presiding judge. *Young v. Martin*, §§ 1948-1950. See §§ 1978, 2032.

§ 1898. The ruling of the court on a demurrer may be saved by incorporating the demurrer into the record. *Ibid.*

§ 1899. The grounds on which a motion was made or denied must be shown by the record. *Ibid.*

§ 1900. It is not material that an exception appears to have been taken a year before the trial, where the title and the certificate show that it was taken at the trial. *United States v. Wilkinson*, §§ 1951-1953.

§ 1901. Where a document is shown by the exception to be admissible in evidence, the presumption is against the action of the court in rejecting it; the grounds on which it was rejected should be shown. *Ibid.*

§ 1902. The act of March 3, 1865, providing for a review on bill of exceptions of cases tried without a jury, is general in its terms, and applies to the district of Louisiana. *Generes v. Campbell*, §§ 1954-1956.

§ 1903. A bill of exceptions need not be sealed by the judge; his signature is sufficient. *Ibid.* See § 2032.

§ 1904. Where the bill of exceptions does not purport to give all the evidence to which the exception relates, and the reasons for the decision do not appear in the record, the supreme court will not revise. *Ibid.*

§ 1905. Where exceptions were properly taken at the time, but the bill of exceptions was not prepared before the adjournment of the court for the term, and at the next term of the court an order was made directing that the bill of exceptions be filed as of the date of the trial, *held*, that the bill could not be treated as a part of the record. *Müller v. Ehlers*, §§ 1957, 1958. See §§ 1991, 1998, 2005.

§ 1906. The exception must show that it was taken and reserved by the party at the trial, but it may be drawn out in form and sealed by the judge afterwards. The time within which it may be drawn out and presented to the court must depend on its rules and practice, and on its own judicial discretion; and the matter cannot be regulated by a state statute, unless the statute be adopted as a rule of court. *United States v. Breitling*, §§ 1959-1961.

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